No. 137.

Brief of Monnett

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BRIEF OF DEFENDANT IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 137.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, PLAINTIFF IN ERROR,

vs.

H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(16,630.)

F. S. MONNETT,
Attorney General of Ohio.

S. W. BENNETT,
Of Counsel for Defendant in Error.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,
Plaintiff in Error.
vs.
H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO,
Defendant in Error.
No. 137.

BRIEF FOR DEFENDANT IN ERROR.

HISTORY OF THE CASE.

The action before the court was originally begun in the Court of Common Pleas of Lorain county, Ohio, by the filing therein on the part of the First National Bank of Wellington a petition for an injunction, the plaintiff praying in its petition that it is a National Banking Association incorporated under the National Banking laws of the United States, and doing business in the village of Wellington in said county and State; that the defendant is the duly elected treasurer of Lorain county, said State; that the capital stock of plaintiff bank is divided into one thousand shares of one hundred dollars each, all of which were averred to be fully paid up and the certificates for the shares outstanding and owned by a large number of persons (names not given); that the cashier of the plaintiff bank reported in duplicate to the auditor of Lorain county the resources and liabilities of said

banking association at the close of business on the Wednesday preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders, with the number of shares held by each and the par value thereof, all as required by Section 2765 of the Revised Statutes of Ohio; that the real estate of said bank was valued at $3,420.00, separately assessed and charged on the tax duplicate of said county; that the auditor of said county, as required by Section 2766 of the Revised Statutes of Ohio, fixed the total value of said one thousand shares at $74,710.00, exclusive of the assessed value of the real estate, and transmitted to the Annual Board of Equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of the shares as fixed by said auditor; that the said Board for the Equalization of Bank shares acting under Sections 2808 and 2809 of the Revised Statutes of Ohio fixed the value of said shares at $74,710.00, exclusive of the value of the real estate; and further avers that both said auditor and the State Board for the Equalization of Incorporated Banks, did fix and establish a much higher value for taxation upon and for the shares of the capital stock of the plaintiff bank than upon other moneyed capital in the hands of individual citizens of the State by refusing and disallowing any deduction for bona fide indebtedness from the valuation of the shares so fixed for taxation as is allowed to individuals and other citizens of the State on moneyed capital invested in the credits and securities hereafter more particularly defined; that the auditor certified said valuation of $74,710.00 to the auditor of Lorain county, who entered the same upon the tax duplicate of the county for the year 1893, with any deductions disallowed; that in estimating the value of the stock of the plaintiff stockholders the business and franchises of said bank were considered as a large element of value and the value of said shares was largely increased by reason and in consequence thereof, while the shares of stock in nearly all domestic corporations of the State of Ohio are by the statute of the State especially exempted from taxation, the tax required being only levied and placed upon the portion in which the company's capital is invested exclusive of its franchises, thereby creating a discrimination against the shares of plaintiff, because in the estimate of the value of the corporate property of other

corporations their franchises were not included in the estimate of their values for taxation.

Plaintiff further averred that all unincorporated banks and banking companies and private individuals of said State engaged in banking are expressly authorized by the statute of Ohio to deduct their bona fide debts from all legal claims and demands and denied to the shareholders of plaintiff's bank any right of deduction on account of the shareholders' indebtedness.

Plaintiff further averred that the term credits was defined by Section 2730 of the Revised Statutes of Ohio and sets forth in its petition such statutory definition; and averred that a large amount of moneyed capital in the hands of individual citizens of the State and of Lorain county invested in promissory notes and other legal obligations is by Section 2730 allowed a deduction of their bona fide debts to be made therefrom, thereby making an unjust and unlawful discrimination in moneyed capital invested in national bank shares as to which no exemption or deduction is provided for by the laws of the State; and avers that said discrimination is in direct violation of Section 5219 of the Revised Statutes of the United States, and sets forth in his petition the provision contained in said section. Plaintiff then sets forth the names of eight stockholders, giving the number of shares held by each in plaintiff's bank, which the court will find upon examination of the averment to have been 490 shares in the aggregate; out of the total number of shares amounting to 1,000, that said 490 shares were valued by said Board for the Equalization of Incorporated Banks for the year 1893 at $36,607.90, and certified by that board to the auditor of Lorain county as the taxable value of the same. That rate of taxation for the taxes assessed and collected for the year 1893 within said county and village was .0255% on one dollar valuation and amounted on said value of said shares to $933.50.

That on the second Monday of April each of said above named shareholders (eight in number) was indebted and owing to others of legal bona fide debts a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares.

That said stockholders were entitled to have deducted from the value of said shares the excess of said debts over their credits

severally owned by them, proof of which fact shall be duly made to said auditor and the State Board of Equalization, by the shareholders at the time that they respectively fixed the valuation of said shares of stock.

That both the auditor of said county and the State Board of Equalization for Banks refused to allow the deduction of any indebtedness of said stockholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right of claim of said shareholders to said deduction, and the said auditor has carried upon the duplicate and delivered to the treasurer the entire valuation of said shares so made without allowing and expressly refusing to allow any deduction therefrom by reason of any bona fide indebtedness of said shareholders to others.

The plaintiff further avers that by Section 2839 of the Revised Statutes of Ohio it is declared (here follows a copy of Section 2839 of the Revised Statutes of Ohio).

It is further averred that the defendant threatens in case of non-payment of said taxes to give the notice provided for in said section and thereby prevent the transfer of any of the shares of stock from said stockholders or any other persons to whom they or either of them may have sold them.

Plaintiff further says that if the shares of said stock are permitted to be sold under said lien irreparable injury would be done to each of the shareholders and the defendant would subject it to great loss of standing and credit, for the redress of which the law affords no remedy.

Then follow averments as to what its irreparable injury would consist of, that it would subject it to a great number of suits to adjust the rights of all the parties, the plaintiff would be subjected to great expense.

Plaintiff says that by due authority of law said defendant has endorsed to the plaintiff the collection of certain debts due to said treasurer, its own taxes among them, but under the agreement that it would remit said taxes so collected on December 30th, 1893; that unless enjoined by this court said defendant would demand of the plaintiff on December 30th, 1893, the whole one-half of said taxes so standing on the duplicate against this plaintiff.

Plaintiff then pleads a tender of $485.80, which the defendant refused to receive unless the plaintiff would also pay the taxes on the shares of stock on which said deductions are authorized and required and bring said tender into court for the amount of the taxes lawfully levied on said shares against said plaintiff shareholders and submits and subjects the same to the order of the court; then follows a prayer that the defendant and his successor in office may be enjoined from collecting or attempting to collect from the plaintiff or its individual stockholders any of the said taxes as the same stands charged on the duplicate, that the defendant and his successor in office may be decreed to receive in full of said taxes the sum so tendered by the plaintiff and brought into court, that said injunction may be made perpetual, etc.

To this petition there was an answer filed by the defendant as treasurer of Lorain county, which answer admits that the defendant is the treasurer of Lorain county; that the plaintiff is a National Banking Association; that it has a capital stock of $100,000.00, divided into 1,000 shares of $100 each, all of which are paid up, and that certificates for such shares are outstanding and owned by a large number of persons; that the cashier of the plaintiff made a report of the resources and liabilities of plaintiff as they existed on the Wednesday next preceding the second Monday of May, 1893, together with the names and residences of the shareholders therein, the number of shares each and the par value thereof; admits that the assessed value of the real estate owned by plaintiff was included therein; admits that the auditor of said county, as required by law, fixed the total value of said shares according to the true value in money at $74,710.00, exclusive of the assessed value of said real estate; admits that he transmitted the same to the annual Board of Equalization of Incorporated Banks; that a copy of said cashier's report and the valuation of the shares so fixed by him, admits that said State Board for the Equalization of Banks, acting in accordance with law, did equalize the assessments of said bank and fixed the valuation thereof at $74,710.00, not including the value of the real estate; admits that the Auditor of State did certify said valuation

to the auditor of said county; admits that said auditor did enter the same upon the tax duplicate for the year 1893, disallowing the deductions claimed; admits that the several stockholders named in the petition owned the number of shares respectively as in the petition set forth; admits that said shares were valued for taxation for the year 1893 at $36,607.90; admits that the same was placed upon the tax duplicate of Lorain county at that valuation; admits that the rate of taxation in said village is correctly stated in the petition; that the taxes assessed against said shares is correctly stated and that said Board of Equalization and the Auditor of State refused to allow the deduction claimed by the said shareholders; admits that he placed upon the duplicate the entire valuation of said shares as was so fixed; admits that the several sections of the Statutes of Ohio are so far as cited accurately stated in said petition; admits that plaintiff intends to avail himself of all legal measures provided for the collection of taxes so assessed; and denies each and every other allegation and averment in the petition contained, and prays that the petition may be dismissed and for other proper relief.

On the issues as thus presented by this petition and answer the cause was heard on its merits in the Court of Common Pleas of Lorain county, Ohio, at the May term thereof, 1894, and upon the request of the plaintiff that the court state its conclusion of fact separately from its conclusions of law, the court did make a finding of the facts as shown by the record herein, and also stated its conclusions of law separately therefrom, and found that the plaintiff was not entitled to an injunction as prayed for in the petition, and that the petition should be dismissed, thereupon judgment was rendered upon said finding, according to which judgment and decree the plaintiff excepted.

Thereupon, on August 6th, 1894, the plaintiff bank filed in the Circuit Court of Lorain county, Ohio, its petition in error as set forth in the record herein, alleging two grounds of error relied upon.

First: That the court erred in rendering judgment in favor of the defendant in error on the special finding of facts made in said case.

Second: That the judgment upon said record ought to have been given to the plaintiff instead of to the defendant in error.

Thereupon afterwards at the October term, A. D. 1894, said cause came on to be heard in said Circuit Court of Lorain county, Ohio, upon the petition in error of said plaintiff bank on the papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas and *the special findings of fact filed therewith.*

The Circuit Court found there was error manifest upon the face of the record to the prejudice of the plaintiff in error in this, to-wit: That judgment was given for the defendant on said special finding of fact, when the same ought to have been given to the plaintiff.

The judgment of said Circuit Court was that the judgment of the Court of Common Pleas be reversed, and said Circuit Court proceeding to render the judgment which, according to said Circuit Court, the Court of Common Pleas should have rendered, ordered, adjudged and decreed that the said defendant, the treasurer of Lorain county and his successor in office, be perpetually enjoined from in any manner proceeding to collect the taxes described in the petition and asked to be enjoined, or any part thereof, and a special mandate was sent to the Court of Common Pleas to carry said judgment and order for costs into execution.

To this judgment and decree of the Circuit Court of Lorain county, the present defendant in error, acting then as plaintiff in error, prosecuted error in the Supreme Court of Ohio, by filing therein its petition in error.

Said cause was thereupon heard in the Supreme Court of Ohio at the January term, 1897, to-wit: on the 27th day of April, 1897, the judgment of said court being that the judgment of the Circuit Court must be reversed and that of the Court of Common Pleas affirmed. This cause is entitled Chapman, Treasurer of Lorain County, vs. The First National Bank of Wellington, and

is reported in the 56 O. S. Report, pages 310 to 333 inclusive. (See Record, pages 19 to 31 inclusive.)

The Supreme Court of Ohio proceeding to render the judgment that said Circuit Court should have rendered, ordered and adjudged that the judgment of the Circuit Court of Lorain county, Ohio, be reversed, and that the judgment of the Court of Common Pleas of Lorain county be affirmed.

To said judgment of the Supreme Court of Ohio the said First National Bank of Wellington prosecutes error of this court by virtue of Section 709 of the Revised Statutes of the United States.

ARGUMENT.

I. FINDINGS OF FACT CONCLUSIVE.

It will thus be seen from the facts recited as taken from the Record filed herein (See pages 9, 10 and 11 of the Record) that both of the reviewing courts in and for the State of Ohio, viz: The Circuit Court of Lorain county and the Supreme Court of the State, reviewed said cause upon the findings of fact and the conclusions of law as made by the Court of Common Pleas of Lorain county, and disclosed by the record herein and embraced within seven distinct paragraphs, to which reference is above made. The finding of facts was made pursuant to Section 5205 of the Revised Statutes of Ohio, which reads as follows:

"Section 5205. Upon the trial of questions of fact by the court it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law."

We contend that this court can only inquire into the Record that was before the Supreme Court of Ohio, and that the evi-

dence upon which that court acted is wholly embraced within the findings referred to, and that said findings cannot be supplemented with any other or further evidence; and the question before this court must be, "Is the judgment rendered by the Supreme Court of Ohio such a judgment as the facts found require?"

As to the conclusiveness of the finding of facts binding the parties to the record we state the following authorities:

The Supreme Court of Ohio in the case of Ralston vs. Kohls, Administrator, reported in the 30 O. S. Rep., pages 92 to 100 inclusive, the court say on page 99:

"The evidence upon which issues of fact are found, whether by the court or a jury, can be brought upon the record and made a part thereof only by a bill of exceptions."

Again on page 100 the court says: "The plaintiff in error had a right to have the findings of fact made part of the record without any bill of exceptions; but if he desired to raise a question as to whether these findings were warranted by the evidence he could only do so by a bill of exceptions showing the evidence upon which such findings were made, or that they were made without evidence."

In the case at bar, by an examination of the brief of the plaintiff in error, it will be found that fully one-third of the brief is made up of statements of conclusion which are not supported by the findings of fact, and as there was no bill of exceptions embodying all of the evidence taken in this case, there is no way to bring before the court the evidence upon which the facts set forth in the findings were found, therefore the plaintiff in error is limited by the findings of fact and the findings cannot be supplemented by any statement record or found "aliunde" the record.

In the case of Carpenter vs. Warner, 38 O. S., page 416, the Supreme Court of Ohio held:

"Where a court is requested under the statute to find and state the facts and law separately and no objection is made at the time to the sufficiency of the facts found a party cannot avail himself of a defect in the findings in a court of error; but must submit to such judgment as the facts found require."

The courts cite with approval the 31 Cal., p. 591, and The Second Nevada, p. 47.

On page 420 of the same report the court say:

"The contention on behalf of plaintiffs in error in admitting that the judgment debtor did not select this property to hold exempt from levy and sale in lieu of a homestead, for the reason that no execution was issued, and no opportunity was offered him to make the selection and claim the exemption, therefore, the law will presume that he would have made the selection and claimed the exemption if an execution had issued. If such conclusion be regarded as a mere inference of fact, such as a jury or a court, as a trier of facts, might have drawn from the circumstances it cannot avail the plaintiffs in error, as no such fact was found by inference or otherwise."

In the case of Kilgore vs. Emmitt, 33 O. S. Rep., page 410, the Supreme Court of Ohio say:

"Where there are several issues, one of which is made by a demurrer to a reply, and the case is submitted to the court generally, with a request by the defendant for special findings on one of the issues of fact, and the record shows a special finding and judgment on that issue with an exception thereto; also, a general finding and judgment thereon without exception, but it nowhere affirmatively appears what disposition was made of the demurrer; held: In such case in the absence of all showing to the contrary the general findings and judgment will be presumed to include all issues made in the case not specially passed upon."

In the case at bar this court will observe that there is no exception made by the plaintiff bank to the facts as found by the trial court. There is an exception entered by said plaintiff to the court's conclusions of law and an exception to the judgment and decree. Therefore the facts as found by the Court of Common Pleas of Lorain county as shown by the Record were the facts and the only evidence before the Circuit Court and the Supreme Court of Ohio. Hence, we contend, that under the well established rule set forth in Section 709 of the Revised Statutes of the United States, that the jurisdiction of this court on writs of error to said courts is confined to the final judgment or decree in a suit in the highest court in which a decision in the suit could be had—

that the finding of facts can only be resorted to for the purpose of determining the question of law, whether the judgment rendered is such as could be supported by the facts found? And not, that if certain other evidence was introduced, as set forth in the brief of the plaintiff in error, then some other judgment might have resulted therefrom.

Bond vs. Dustin, 112 U. S., 604.

Supervisors vs. Kennicott, 103 U. S., 556.

The presumptions of law are all in favor of the validity of the judgment, likewise, the presumption of law is that the finding of facts are presumed to have been the only facts before the court.

Jones vs. Brown, 11 O. S., 606.

Springer vs. Avondale, 35 O. S., 624.

In the case of Westfall vs. Dungan et. al., found in the 14 O. S. Rep., page 276, the court in the first paragraph of the syllabus says: "The findings of a court or jury on the trial of issues of fact made by the pleadings in an action, are not subject to review on error, except where it appears from the record that a motion for a new trial has been made on the ground that the verdict or finding of the court is against the evidence, and such motion has been overruled."

And on page 279 of the same report, the court say: "The right (of review) is made dependent on the overruling of a motion for a new trial. For in no other way could all the evidence be embodied in a bill of exceptions and legally brought into the record. But in this case no motion for a new trial was made; there was no authority of law for bringing the whole evidence into the record, and we are not authorized to review it."

Citing Kepner's Adm'r vs. Sniveley's Adm'r, 19 O. Rep., 296.

Our only apology for stating the above authorities covering practice in the courts of record in the State of Ohio, is to show that the Supreme Court of Ohio cannot be said to have had any other or further evidence before it than that contained in the findings of fact referred to, and that this court considering this cause on writ of error from the Supreme Court of Ohio will not consider any other or further facts than those set forth in the findings of fact.

No motion for a new trial was made by the plaintiff bank, as shown by the record, hence, the facts as found, has not, and cannot be excepted to; but the sole and only question is as to the questions of law based upon the finding of facts so made, for, as said by the Supreme Court of Ohio, in Jones et. al. vs. Brown, 11 O. S., on page 606, "We are limited strictly to the facts found, and must decide on their legal effect."

"Whenever the judgment of the highest court of a State is brought here for the re-examination of its decision of some federal question, the court must consider the question as it comes from that court."

Melendy vs. Rice, 94 U. S., 796.

"The finding of the court below as to facts is conclusive upon the Supreme Court of the United States."

Norris vs. Jackson, 9 Wall, 127.

Insurance Co. vs. Sea, 21 Wall, 160.

"The court cannot consider the effect of the evidence in the case, but can consider the evidence only to determine whether the facts found are sufficient to support the judgment."

II. THE DECISION OF THE SUPREME COURT OF OHIO.

If our position be maintained in the foregoing proposition as to the conclusiveness of the findings of facts and as to the record presenting but a single question—one of law—viz: Is the judgment rendered such as is supported by the facts found, then we are ready to analyze the position of the Supreme Court of Ohio to discover if error was committed by that court in its conclusion of law from the facts as so found.

In the case of Walter A. Wood Co. vs. Skinner, 139 U. S., 293, this court said: "The opinion of a State court may be referred to to determine the ground on which judgment in the case was rendered."

Referring to that part of the decision of the Supreme Court of Ohio, found on page 25 of the transcript of the Record, the

court, after citing the sections of the Revised Statutes of Ohio governing the question of what constitutes "credits" in Ohio, and what "indebtedness" can be deducted from "credits", say:

"It will be noticed that there is a large class of indebtedness that cannot be deducted from the credits, and to enable the bank to fairly raise the legal question in this case *it should show that the debts sought to be deducted were of the class that our statute allows to be deducted from credits, and that such deductions were generally made by others to an extent that materially affected the said shareholders financially.* A mere theoretical discrimination is not sufficient, it must be actual and material.

The petition avers that a large amount of moneyed capital in the hands of individual citizens of said State and county invested in promissory notes, and other legal obligations, securities, claims and demands is by allowing a deduction of legal bona fide debts to be made therefrom exempted from taxation, but this averment is denied in the answer, and the court does not find it to be true.

So that, for aught that appears in the findings of fact by the court, there was no deduction of debts made from credits, either in the State or county, and the only effort that was made to have such deduction, so far as this record shows, was the effort on the part of these eight shareholders, and *that was unsuccessful.*

The petition avers that 'between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others, of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, proof of which fact was duly made to said auditor and said State Board of Equalization by the shareholders at the time that they respectively fixed the valuation of said shares of stock.' This averment does not say *that the legal bona fide debts owned by said stockholders and not used as a deduction from credits in making out their tax lists to the assessor*, were not of the class which are not authorized to deduct from the

credits, ***nor that they were of the class which are authorized to be so deducted.*** The averment is denied by the answer, and this put the bank upon its proof. As a result of such proof the court finds that 'between the first and second Mondays of May of said year, each of said above named shareholders was indebted and owing to others of legal bona fide debts a sum in excess of ***the credits***, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said Board of Equalization.'

While the court finds that there was an excess of indebtedness over credits to an amount equal to the value of said bank shares, it fails to find that such indebtedness was of the character which is authorized under the Statutes ***of Ohio to be deducted from credits.***"

It will thus be noticed by this court that one of the grounds on which the judgment of the Supreme Court of Ohio was based was an entire failure of proof on the part of the plaintiff bank in the following particulars, to-wit:

1. That the debts sought to be deducted were of the class the Ohio Statute permits to be deducted from "credits" as defined by the Ohio Statute.

2. That such deductions were generally made by others to an extent that materially affected the said shareholders financially.

3. That moneyed capital in the hands of individual citizens of said State and county invested in promissory notes and other legal obligations, securities, claims and demands is allowed a deduction of legal bona fide debts therefrom, and thus exempted from taxation.

These were issuable facts. The petition avers them and they were denied by the answer. The plaintiff bank was called upon for proof of the averments in the petition and did not satisfy the court of the existence of the facts averred.

Under the Revised Statutes of Ohio (Section 2730), it is not every class of "debts" that are permitted to be deducted from "credits," in making up the amount of credits "over and above the sum of legal bona fide debts owing by such person."

The following classes of obligations ***are not considered "debts" for purposes of deduction***, viz.:

(1.) Obligations to any mutual insurance company.

(2.) Unpaid subscription to the capital stock of any joint stock company.

(3.) Any subscription for any religious, scientific, literary or charitable purpose.

(4.) Any acknowledgment of any indebtedness unless founded on some consideration at the time received, and believed at the time of making such acknowledgment to be a full consideration therefor.

(5.) Any acknowledgment made for the purpose of diminishing the amount of the credits to be listed for taxation.

(6.) No greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be compelled to pay, or to contribute, in case there be no securities.

Here are six distinct classes of debts, that the Ohio Statutes say shall not be taken into account "in making up the sum of such debts."

They may be "legal bona fide debts owing by such person"; ***but for purpose of making up "credits", they cannot be classed as*** such debts. ***They are none the less debts***, but shall not be considered as such, when the excess of credits over debts is to be computed.

Now, for all that the record discloses herein, the "debts" claimed by the plaintiff bank, that it should have been permitted to have deducted, ***are all of the above six prohibited classes.***

In view of the issues and state of the proof herein, was not the Supreme Court of Ohio justified in finding as they did? viz.:

"That this record fails to bring the debts sought to be deducted, within the class which is authorized to be so deducted."

But counsel for the plaintiff bank, in his brief (on page 7) contends that the finding of the trial court (see Record, page 10)

is sufficiently definite from which to discover that the character of debts sought to be deducted was of such kind as was not prohibited by the section of the statute above referred to. The finding referred to, being the latter part of the sixth paragraph in the finding of fact on page 10 of the Record, only characterizes these obligations that were at that time owing by the shareholders named in the petition, as ***legal bona fide*** debts. The debts are not in any other way, or by any other language, described, or more definitely defined as to kind or quality, than by the expression, "***legal bona fide debts.***"

As we have said before, these obligations may be legal bona fide debts owing at the time by the person claiming the deduction; that is, they are existing obligations against him; they are debts in the sense that they are claims against him and against his property; they must be met at some time, and paid; but simply because they are classed in the finding as "legal bona fide debts," that does not find that they are any such debts as the statute permits being deducted in making up the excess of credits over debts. Our answer to that is, first, the answer of the Supreme Court, which passed upon the sufficiency of the findings of fact, and rendered such judgment as it thought the facts would support.

We quote from page 26 of the Record: "While the court finds that there was an excess of indebtedness over credits, and an amount equal to the value of said bank shares, *it fails to find that such indebtedness was of the character which is authorized under the Statutes of Ohio to be deducted from the credits.*

"*This court cannot presume in the face of the record* * * * *that the said debts of the said stockholders were of the class authorized to be deducted from the credits under our practice, the presumption is that the court found all the facts which the proof warranted, and facts not found by the court are presumed not to exist.*"

Citing: Jones vs. Brown, 11 O. S., 606.
Springer vs. Avondale, 35 O. S., 624.

"It is therefore clear, that this record fails to bring the debts sought to be deducted, within the class which is authorized to be so deducted."

The conclusion arrived at by said court seems to us to have been irresistible, and the only one which the facts would warrant. But in the case of the First National Bank of Garnett vs. Ayres, found in Volume 160 U. S. Reports, page 660, we think the court has passed upon this question and sustained the view that we take of it. That case, like the case at bar, was heard upon a finding of facts, and in that finding of facts was embodied the following language:

"*On the day last named certain stockholders, named in the statement, were justly indebted and owed in good faith the several sums of money set opposite their respective names in plaintiff's petition. These debts were not owing to any person, bank or corporation as depositors in banks or banking associations, or any person or firm engaged in the business of banking in Kansas or elsewhere, nor were they debts owing on account of any of the things named in the Kansas Statute hereinafter alluded to.*"

Turning to that part of Section 6847 of the general Statutes of Kansas defining what debts may be deducted from credits, we find the following language: "Debts owing in good faith by any person, company or corporation may be deducted from the gross amount of credits belonging to said person, company or corporation. Provided, such debts are not owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this State or elsewhere; and the person, company or corporation making out the statement of personal property to be given to the assessor, claiming deductions herein provided for, shall set forth both the amount and nature of the credits, and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment, or loan for a policy of life insurance, nor on account of any unpaid subscription to any religious, literary, scientific or benevolent institution or society."

In that finding the court will note that it was distinctly found "that the debts were not owing to any person, company or corporation as depositors in any bank or banking association or any person or firm engaged in the business of banking in Kansas, or elsewhere; *nor were they debts owing on account of any of the things named in the Kansas Statute herein alluded to.*"

If the finding in the case at bar had been made in the same way that the finding was in the Ayers case, or if counsel had seen to it that it was made so as to support the contention they now make, it would have read: "The debts were not obligations to any mutual insurance company; nor unpaid subscriptions to the capital stock of any joint stock association; nor any subscription for any religious, scientific, literary or charitable purpose; nor in acknowledgment of any indebtedness unless founded on some consideration at the time received, and believed at the time of making such acknowledgment to be made for the purpose of diminishing the amount of the credits to be listed for taxation; nor did they embrace any greater amount or proportion of any liability as surety, than the person required to make the statement of such credits believed that he is in equity bound, and will be compelled to pay; nor are they such debts "as are prohibited by the statute from being deducted from credits."

There could have been no exception to any such finding, if made; but the Supreme Court of Ohio is not called upon to supply the missing evidence; nor to infer a state of facts as proven, which in fact was not proven; nor should this court travel outside of the case to do for the plaintiff in error what it failed to do for itself.

The decision, as contained in the Record, shows further that there was a failure of proof, as hereinbefore recited, regarding the claim made by the plaintiff in error that deductions were generally made by others to an extent that materially affected the said shareholders financially; and also a failure of proof regarding moneyed capital in the hands of individual citizens being allowed a deduction of certain bona fide debts therefrom.

We consider that all of these reasons as given by the Supreme Court of Ohio, for finding against the plaintiff in error,

are fundamental and material, and has been thoroughly settled in the Ayres case referred to.

The syllabus of that case is as follows:

"The single fact that the Statutes of Kansas, regulating the assessment and taxation of shares of national banks, *permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks*, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders in violation of the provisions of the Revised Statutes, Section 5219."

In that case, as in the case at bar, this court was asked to take judicial cognizance of what was claimed to be facts, but not embraced within the finding of facts. On page ten of the brief of plaintiff in error the court is asked to take judicial notice of certain things, such for instance as is found on pages 12, 13 and 14, and the financial statements made on pages 32, 33 and 34 of the brief of the plaintiff in error.

Upon this subject the court said in the Ayres case, quoting from page 667: "From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. *In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take, what council for plaintiff calls judicial notice, of what is claimed to be a fact*, viz.: That the amount of moneyed capital in the State of Kansas from which debts may be deducted as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. *This we cannot do, for there is no proof whatever upon the subject. The State court has thus determined from its own knowledge that the credits from which debts may be deducted do not constitute a large or even material part of the moneyed capital of the State*, but on the contrary that court says that debts secured

by liens on real estate, money invested in corporate stocks of all kinds and descriptions, including railroad, banking, insurance, loan and trust companies and also the multifarious forms of moneyed securities, moneys on deposit subject to call, and other forms of invested capital, constitute the great bulk of the moneyed capital in that State, and from all such moneyed capital no deduction for debts is allowed. As the record appears there is no fact of which the court can take judicial notice. The relative proportions in which the moneyed capital in the State of Kansas is invested in the various kinds of securities to be therein found this court cannot judicially know. When proof shall be made regarding that matter, it may then be determined intelligently whether, within the case of the Mercantile Bank, Supra, there has been a real discrimination against the holders of national bank shares, and hence a violation of the above cited act of congress. *The single fact that the Statute of Kansas permits some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show such violation.*"

All of the above quotation is applicable to the case at bar; and as the court in that case refused to take judicial notice of the facts requested of it, so we can find no reason why the court should distinguish the case at bar from the Ayres case, and take judicial notice of the matter recited in counsel's brief for the plaintiff in error, when those matters are not embraced within the findings of fact.

III. JUDICIAL NOTICE.

In addition to the case of Ayres vs. Bank, 160 U. S., 667, we cite the court to the following authorities, holding that this court will not judicially notice the facts as requested by counsel: In the case of R. R. Co. vs. Hoffhines, 46 O. S., found on page 650, the Supreme Court of Ohio passed upon this question with regard to a co-ordinate branch of the administrative department of the government. In that case it was shown that the Commis-

sioner of Railroads of the State of Ohio was required by the statute to report annually to the Governor of the State as provided by Section 63 and Section 264 of the Revised Statutes of Ohio. The report of the Auditor of State is of no higher order than that of the Commissioner of Railroads, yet the court held against the proposition in the following language:

"It is not insisted that there is any allegation, proof, or admission of this claim. Reference is made to the several acts, which show the incorporation of the roads as stated. To sustain the statement that the subscriptions were paid, and hence that the corporate name became changed at once to the Marietta & Cincinnati Railroad Company, *counsel cite the report of the Commissioner of Railroads for the year 1870, wherein it is stated that the subscriptions were made in conformity with the statute and the name of the company changed* to that of the Marietta & Cincinnati Railroad Company. *The court is thus asked to take judicial notice, not only of the acts referred to, but of the statement contained in the reports. If this can be done the claim is sustained; if it cannot, the claim fails, and there is nothing before the court to show when, or under what law, the Marietta & Cincinnati Railroad Company was organized.* There is apparent conflict of decision in this State as to what law will be judicially noticed, and there is at least doubt whether the act of March 21st, 1851, can be so noticed. The holding in Brown vs. The State, 11 Ohio, 277, is authority to the effect that such a law can be noticed, while the decision in Railway Company vs. Moore, 33 O. S., 384, is to the contrary. We will not here attempt to reconcile these cases. But it may be said of the earlier acts, that, although it is in the form of a special law, and classed among the local laws in the yearly volume, yet it is of a public rather than private nature, inasmuch as it contains grants of sovereignty interesting as well the community whose rights are thereby contracted, or the corporators whose rights are thereby enlarged. And assuming, without holding, that both acts referred to may be judicially noticed, there still remains the question whether the *contents of the commissioners' report can be so treated.* There are certain executive documents, such as official proclamations,

treaties with foreign powers, and other public documents, issued by the executive or legislature, which courts will notice judicially, ***but an examination of an extended line of authority fails to disclose a single holding to the effect that documents similar to that of a commissioner's report may be classed among those of which judicial notice will be taken.*** Nor can the claim be sustained upon reason. In general, courts will judicially notice only such facts, or conclusions from facts, as are not the proper objects of evidence. Such are styled "***nonevidential.***" Wharton on Evidence, Vol. 1, Sec. 277. It cannot be said that the court, from its presumptive knowledge of the law, or of public events, would have within judicial cognizance, the statement of the Commissioner of Railroads as to an antecedent fact. The question whether or not the statute of March 21st, 1851, had been complied with, could have been put in issue in the pleadings. It would then have been a proper subject of evidence, and could have established or disproved by any witness having knowledge of the fact. This could not be true as to matters which the court may judicially notice."

We also cite Hanley et. al. vs. Donoghue, 116 U. S., p.1. Also refer the court to the authorities cited in Renad vs. Abbott, 116 U. S., 277.

IV. CONSTRUCTION OF THE TERMS "INVESTMENTS IN STOCKS," "CREDITS" AND "MONEYED CAPITAL."

It is a conceded proposition, that the legislatures of the several states derive their right to tax bank shares in national banks from the grant of power made by congress to the states as contained in Section 5219, Revised Statutes of the United States. The power to tax such shares is subject to but two restrictions, viz.:

(1.) "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

(2.) "And that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

"The right to tax such shares exists, *and the manner of imposing the tax* is for each State to determine for itself, subject only to the two restrictions cited."

Richards vs. Rock Rapids, 31 F. R., 508.

Subject to these two restrictions, the State's right to tax national bank shares is as unlimited as to any other property.

It follows, therefore, from the power vested in the several states, that the legislatures thereof have the right to provide for the classification of bank shares, for purposes of taxation, among the varied forms of property mentioned in the statutes, upon which taxes shall be levied by State authority, *keeping in view the restriction aforesaid;* and also that such classifications be with property similar in character to that of the shares so listed. Such classification is a subject of State legislation.

"It was deemed consistent * * * with these national uses, and otherwise expedient, *to grant to the states* the authority to tax them (the bank shares) within the limits of the rule prescribed by the law. In fixing those limits it became necessary to prohibit the states from imposing such a burden as would prevent the capital of individuals from freely seeking investments in institutions which it was the express object of the law to establish and promote."

Mercantile Bank vs. New York, 121 U. S., 154.

Bank vs. Boston, 125 U. S., 60.

"The statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule, and according to its true value in money."

Wagoner vs. Loomis, 37 O. S., 571.

As different classifications must necessarily be made of all property and each class defined, so that it may be made to bear its equal share of taxes with all other classes, so also *different modes and agencies* must be employed for listing, valuing and equalizing different kinds of property, and these modes and

agencies, may be, and sometimes are not the same as those employed for the like as to other property. To this no objection can be made.

It is then, not the *use* of the various classifications, or various modes and agencies employed, that can be complained of, but *the abuse* of such means—and the *abuse*, defined by Section 5219, Revised Statutes U. S., of which complaint may be made, if at all, is in assessing upon shares in national banks, a greater rate than is assessed upon other "moneyed capital" in the hands of individual citizens. As different modes of listing, valuing and equalizing the same were necessary to attain the object of equal and impartial taxation, the legislature of Ohio passed Section 2730, Revised Statutes, creating "classes" of property, and also defining what property should be included in each class. (See analysis of said section on page 15 of this brief.)

Among other "classes" thus created was, one styled "Investments in Stocks," which was defined to mean and include,

"All moneys invested in the capital or stock of any *association*, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferrable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this State, either for themselves or others."

Another class created by the same statute was styled "credits", which was defined to mean:

"The excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money (as hereinbefore defined), when added together (estimating every such claim or demand at its true value in money), *over and above the sum of legal bona fide* debts owing by such person; but in making up the sum of such debts owing there shall not be taken into account (then follows six different classes of obligations that cannot be deducted from "credits", as above defined)."

It will then be seen, that, by the above, it is only certain

kinds of personal property included in the term "credits", and only certain kinds of bona fide debts that can be deducted from "credits", thus defined. Deductions cannot be made of debts of any kind from any other class than "credits."

In the consideration of this case by the Supreme Court of Ohio, that court was called upon to determine, to what class under Section 2730, Revised Statutes, bank shares should be assigned. That court determined that bank shares should be classed as "investments in stocks" as above defined, and not as "credits." And being held to be stocks, the legal bona fide debts of the owner of such shares could not be deducted from their assessed value. In thus assigning national bank shares to the statutory class known as "stocks", the limitation placed upon the State's right to tax was born in mind, to-wit: "That taxation shall not be at a greater rate than is assessed upon other *moneyed capital*, etc."

Bank shares are only permitted to be exempt from taxation to the degree that other "moneyed capital" is exempted by the statute.

This brings us to the construction of the term "moneyed capital" as employed in Section 5219, Revised Statutes U. S., by this court; and a comparison of that definition with the statutory definition of "Investments in Stocks," and "credits." Bank shares being "moneyed capital," if "moneyed capital," as defined by this court, is in reality identical, or substantially so, with "investments in stocks," as defined by Section 2730, Revised Statutes of Ohio, then it follows, that the same treatment accorded "investments in stocks," by the taxing officers in Ohio, should be accorded "moneyed capital"; and if that has been done, and no appreciable discrimination is made in favor of stocks, and against "moneyed capital," then the restriction contained in Section 5219, Revised Statutes of United States, has not been violated.

DEFINITIONS OF MONEYED CAPITAL.

"Moneyed capital" as used in Revised Statutes, Section 5219, forbidding a State to tax shares of stock in national banks at a greater rate than is assessed upon other "moneyed capital" in

the hands of individual citizens of the State, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money."

Anderson's Law Dictionary, page 684.

Justice Matthews in Bank vs. Boston, 125 U. S., on page 68, in making a comparison "of national bank shares with that of insurance companies, and trust companies, The American Bell Telephone Company and the Mass. Hosp. Life Ins. Co.," says that: "Within the definition of that phrase (moneyed capital) established in the case of the Mercantile Bank vs. New York, 121 U. S., 138, the interest of individuals in these institutions is not moneyed capital."

"*The investments made by the institutions themselves*, constituting their assets, are not moneyed capital in the hands of individual citizens of the State."

People vs. The Commissioners, 4 Wall, 244.

In the case of the Mercantile Bank vs. New York, 121 U. S., on page 153, the court say in commenting upon Van Allen vs. The Assessor, 3 Wallace, 537:

"It follows as a deduction from this decision that "moneyed capital in the hands of individual citizens" does not necessarily embrace shares of stock held by them in *all* corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of the shareholders, although shares in some corporations, according to the nature of their business may be such "moneyed capital."

"The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery under blank power of attorney, and to be dealt in by sales at the stock exchange, or used as collaterals for loans, as though they were negotiable security for money. This quality in a greater or less degree, pertains to all stocks in corporate bodies, the facility of

their use in this way being in proportion to the estimated wealth and credit, present and prospective, of the corporation itself."

And on page 154 the court say:

"The true test of the distinction, therefore, can only be found in the nature of the business in which the corporation is engaged. The key to the proper interpretation of the act of congress is its policy and purpose."

The court then proceeded to state the policy of congress in enacting said law; that it was to encourage the establishment and maintenance for such associations for the purpose of providing a uniform system of currency. And in order to prohibit the states from imposing burdens upon capital invested therein, and thus cause it to flow in other channels for investments such restrictions were enacted.

The court concludes by holding that "moneyed capital" is capital employed in carrying on business in enterprises whose capital is money and where the object of the business is the making of profit by its use as money.

In Evansville Bank vs. Britton, 105 U. S., 322, the court say: "The act of congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of individual citizens, credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ."

In Palmer vs. McMahon, 133 U. S., 667, the court define "moneyed capital" as follows: "The term moneyed capital is used in the Revised Statutes, Section 5219, respecting State taxation of shares of national banks, embrace capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their 'moneyed capital' as money, as in banking, as that business is defined in the opinion of the court."

In the case of the People vs. Commissioners, 71 U. S., 257, the Supreme Court held, that: "Insurance companies are not within the contemplation of the act of congress as contained in Section 5219, hence investments in insurance companies are not 'moneyed capital.'"

In the case of Hepburn vs. The School Trustees, 23 Wallace, 483, the Supreme Court say: "It is contended that the term 'moneyed capital' as here used signifies money put out at interest. * * * We cannot concede that money at interest is the only 'moneyed capital' included in that term as here used by congress. The words are 'other moneyed capital,' that certainly makes stocks in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities be included in that descriptive term."

It will be noticed that in the case last above cited that this court in defining "moneyed capital" has used the same expression as used in Section 2730 of the Revised Statutes of Ohio, viz.: Holds it to be "investments in stocks." We conclude from the above holdings of this court that the term "moneyed capital" can be truly defined moneys invested in banking associations and such corporations or companies or kindred organizations, whose business is the making of profit by the use of their "moneyed capital" as money.

We contend that the construction given to this term "moneyed capital" by this court, is similar to that construction given to the term "investments in stocks" by the legislature of Ohio and by the holdings of its Supreme Court, and to no other classification under Section 2730 of the Revised Statutes of Ohio could the term "moneyed capital" be so properly applied as to that class embraced within that statute known as "stocks" or "investments in stocks."

It will be observed how closely the language of Section 2730 above cited follows that of Section 2, Article 12, of the Constitution of that State; and also in giving the statutory classification. It will be observed that the legislature has but followed that classification contained in that part of the fundamental law embraced within Section 2 of Article 12, as follows: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money, etc."

This provision of the Constitution clearly recognizes "money" as one class of property, "credits" as another class,

"investments" as another class, and "investments in stocks" still another class, and so on, and this distinction has been kept up through all the statutes which have been passed under this section of the Constitution.

On the 13th day of April, 1852, the legislature of Ohio passed a tax law, which is found on page 135 of the laws of 1852, and also on page 901 of Swan's Statutes of 1854, and in which the 10th section provided that in making up the amount of "moneys and credits" a person might deduct from the gross amount of "moneys and credits" the amount of his bona fide debts, etc.

This Section 10 of the statute was declared unconstitutional by the Supreme Court of Ohio in the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., page 1. The syllabus is as follows: "The 10th Section of the law which allows individuals and certain corporations in giving their tax list to deduct their liabilities from the amount of their moneys and credits is repugnant to the Constitution of Ohio and is void."

"The constitution permits no deduction of liabilities from moneys and credits."

In the case of Latimer vs. Morgan, 6 O. S., page 280, this decision was approved and followed. The Supreme Court in that case said: "The decision in the case of the Exchange Bank of Columbus vs. Hines. 3 O. S., page 1, giving a construction to the 2d and 3d Sections of the 12th Article of the Constitution, and declaring unconstitutional and void the 10th Section of the tax law of April 13, 1852, approved and followed."

That section of the tax law above referred to being inorperative by reason of the decision in Bank vs. Hines, and Latimer vs. Morgan, Supra., the legislature passed an act on the 1st day of April, 1856, Section 5, which act is found on page 52 of Volume 53 of the Ohio laws, and there defines what "credits" are, and what obligations may be excepted from taxation by deduction from the credits as there defined; but the court will observe that the deduction was not to be made from "moneys and credits", but from "credits" alone, and those only of a certain class; also that the debts to be deducted are of a certain class and do not include debts generally.

This plainly raises a different question than the one that was presented in the case of Bank vs. Hines and Lattimer vs. Morgan, Supra., and the Supreme Court in passing upon this amendatory act in the case of Payne vs. Watterson, 37 O. S., page 121, said:

"Under Title 13 of the Revised Statutes relating to taxation, a person required to list property is not authorized to deduct his debts from his investments in bonds as therein defined and to return the excess only for taxation."

That case presented the question whether debts could be deducted from "investments in bonds" of certain corporations then held and owned by the plaintiff in error. In passing upon that question the court decided that:

"Investments in bonds" were not "credits and therefore the deduction on account of debts could not be made from "investments in bonds," and they again affirm the decision in the case of Bank vs. Hines.

This statute of April 1st, 1856, defining the meaning of the word "credits" was re-enacted in substantially the same words in 1859, page 173, Section 1; also in 1875, page 437; and again in 1876, page 29, and now forms Section 2730 of the Revised Statutes of Ohio.

V. IS THERE SUCH DISCRIMINATION SHOWN BY THE RECORD IN THIS CASE AS COMES WITHIN THE LIMITATION PRESCRIBED BY SECTION 5219, R. S. U. S.

The manner of taxing shares of national banks is left by congress to the State legislature, subject to the restriction "*that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.*" *R. S. U. S., 5219.*

There can be no discrimination between national bank shares and credits as defined in the Ohio Statute, unless this court arrives at the conclusion that *moneyed capital* as provided in R. S., Sec. 5219, U. S., is one and the same thing, or in the same

class with "*credits*" as defined in the Ohio Statute, that is, unless it be determined that "credits" in the Ohio Statute is "moneyed capital."

We do not concede for a moment that these two species of property are in the same class, but are of the opinion that the argument made at a former place as to the classification is conclusive of this case. That is, as the only limitation placed upon the taxing power of the State is, that there shall be no discrimination between national bank shares and other moneyed capital, there can be no comparison for the purpose of determining whether there is any discrimination with any other class or species of property under the Ohio Statute, other than what may be properly classed as moneyed capital, which is only "*investments in stocks*," or *moneys* invested in the capital or stock of any association, corporation, joint stock company, or other company.

The burden of the claim of counsel for plaintiff in error, is, that merely because the law of Ohio does not permit or allow exemption from taxation of national bank shares by deduction of the debts of the owner from the value thereof, while it does allow such exemption or deduction of debts from credits, that "*ipso facto*," there is discrimination and that the statement in the petition, "that a large amount of moneyed capital in the hands of individual citizens of the State invested in promissory notes and other legal obligations, securities, claims and demands, are exempt from taxation by the allowance of the deduction of legal bona fide debts therefrom," is not an allegation which states a fact requiring any proof for its establishment other than a simple reading of the statute. That if evidence is required, none having been offered, the reviewing court will take judicial notice of such facts, as counsel have stated in his brief, which tend to show the discrimination for which he contends.

Reviewing courts do not upon error take judicial notice of facts. Courts when exercising original jurisdiction only avail themselves of this rule, and when they do judicially notice facts, the court, when necessary to support the finding it makes, must find the facts which it judicially notices and upon this the reviewing court will pass its judgment.

The plaintiff in error relies upon the case of Whitbeck vs. Mercantile Bank, 127 U. S., 193, in support of this contention just referred to.

This case and the one at bar are clearly distinguishable; and the Whitbeck case is clearly to be distinguished from certain other cases decided by this court cited as enunciating principles governing this case.

In the Whitbeck case, the question was that bank shares were taxed at a greater rate, per cent., than other moneyed capital all over the State. It was claimed in that case that there was no evidence presented that there was any discrimination against bank shares. The court, meeting that objection, Justice Miller speaking, said:

"There is evidence that the rule which was adopted by the Board of Equalization of Cuyahoga county of fixing the assessment at sixty per centum of the cash value of the property, prevailed in eleven other counties in the State. It is also a fact that in regard to those counties the discrimination against the national banks, as compared with other moneyed capital, is established."

So that to make the finding in that case, the court had evidence before it, and this court in pronouncing its judgment looked to the record before it, and not outside of it.

The Whitbeck case and the one at bar are further to be distinguished in this particular.

The allegations in the Whitbeck case were that upon the assessment of its value of shares of its capital stock for the purpose of taxation, they were estimated at sixty-five cents on the dollar of their real value in money. *While all the personal properiy in the city of Cleveland and county of Cuyahoga, including moneyed capital in the hands of individual citizens of said city and county, was estimated at only sixty cents upon the same basis.*

That was a discrimination in the rate or method of fixing values, by a comparison of fixing all values, which included among all other property the two classes mentioned in Section 5219, viz., bank shares and moneyed capital. The method of comparison provided by Ohio law, or rather as actually adopted by the taxing officers was challenged.

While in the case at bar the allegation of the complaint challenges the right of Ohio law to extend an exemption to one class of property, under which bank shares do not in fact fall, but under whose protection they seek shelter, in the following allegation:

"Between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, etc."

* * *

"That both the auditor of said county and the State Board of Equalization for Banks, refused to allow the deduction of any indebtedness of said stockholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right or claim of said shareholders to said deduction."

Thus it will readily be seen upon the allegations and facts proven in the Whitbeck case and in the one at bar, that they are not under the same class, but that this class comes under another class of cases decided by this court, relating to discrimination by exemption, notably,

Bank vs. Ayres, 160 U. S., 661.

This court and other federal courts have very clearly laid down the rules for the determination of the question whether or not there has been any discrimination in taxing bank shares and other moneyed capital, within the limit prescribed by R. S. 5219, U. S.

In the first place the court has always had in mind the first principle underlying taxation, that exact equality and uniformity cannot be accomplished by law, and in determining whether the proceedings under the different taxing methods fall within the limitation prescribed by congress, the court has uniformly recognized this principle.

Boyer vs. Boyer, 113 U. S., 691.

The policy of the act of congress was to foster the national banking system by protecting national banks as against state banks.

The changed condition of the banking interests was the occasion for a change so that the restriction was that taxation shall not be at a greater rate than other moneyed capital.

Lionberger vs. Rouse, 9 Wall, 474.

Justice Peckham in Bank vs. Ayres, 160 U. S., 664, said:

"In the Mercantile Bank vs. New York, 121 U. S., 138, it was held that the main purpose of congress in fixing limits to taxation on investments in shares of national banks was to render it impossible for a State in levying such a tax to create and foster an unequal and unfriendly competition by favoring State institutions and investments of a like character. Mr. Justice Mathews, in delivering the opinion of the court in the above cited case, gave an exhaustive review of the cases which had been decided in this court up to that time, under this section of the United States Statutes, and it is evident from the opinion and decision of the court in that case that the intent of the United States Statute was to prevent an unjust discrimination against moneyed capital invested in shares of national banks by rendering it impossible for the State in levying a tax on such shares to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character."

Whether or not this discrimination between bank shares and other moneyed capital actually exists is a fact which must be shown and found. This is argued at another place, but here it will be said that the claim of the plaintiff in error stated at the beginning of this subject, that the court will look to the law without proof, and determine, or if proof is necessary, judicial notice will be taken of what is claimed as a fact, has been decided adversely by this court in Bank vs. Ayres, 160 U. S., 660.

The rule adopted by this court as to when a discrimination will be within Section 5219, R. S., is that it must be "so large and substantial as to amount to an illegal discrimination against national bank shareholders."

That: "The single fact that the statutes * * * regulating the assessment and taxation of shares in national banks permit *some* debts to be deducted from *some* moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show that the amount of moneyed capital in the State * * * from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders, in violation of the provisions of Revised Statutes, Sec. 5219."

Bank vs. Ayres, 160 U. S., 660.

"As the act of congress does not fix a definite limit as to percentage of value, beyond which the states may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

Boyer vs. Boyer, 113 U. S., 702.

"As the law now is, the right of the State to tax the shares in national banks is not dependent upon the question whether shares in State or savings banks are taxed. The right to tax such shares exists, and the manner of imposing the tax is for each State to determine for itself, subject only to the two restrictions above cited. It is not, therefore, sufficient, as is assumed in argument, to show merely that the State laws provide a different mode or manner of taxing moneyed capital invested in savings banks or other corporations from that applied to the taxation of money invested in national banks. Before the assessment of the shares in national banks can be held invalid and void, it must be shown there is in fact a higher burden of taxation imposed upon the money thus invested than is imposed upon the moneyed capital."

Richards vs. Rock Rapids, 31 F., 505.

The cases in which it has been held that there have been discriminations, are cases where the mode of assessment has been different than in the case at bar, and where the comparison was made with all other classes of property, while the Ohio law

only allows an exemption from a portion of personal property, viz., credits.

In Supervisors vs. Stanley, 105 U. S., 305, the laws of New York allowed the owner of *all other personal taxable* property to deduct debts while the same privilege was not extended to national bank shares.

To same effect is People vs. Weaver, 100 U. S., 539.

"Necessarily there may be other moneyed capital in the locality than as is exempt. If there is, moneyed capital, as such, is not exempt. Some part of it only is. It could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt."

Hepburn vs. School Directors, 23 Wall, 480.

"A State law is not violative of the act of congress merely on the ground that it allowed a "partial exemption" of a certain kind of moneyed capital, which was designed to prevent a double burden of taxation, both of property and debts secured by it."

Desty on Taxation, p. 388.

VI. COMPARISON OF THE CONSTITUTION AND STATUTES OF KANSAS WITH THOSE OF OHIO, WITH REFERENCE TO THE APPLICATION OF THE AYRES CASE TO THE CASE AT BAR.

We herewith append extracts from the Constitution of Ohio and extracts from the Statutes of Ohio, and in parallel columns quote from similar sections in the Constitution of Kansas and the Statutes of Kansas to show the similarity of the constitutional provisions and the legislation enacted thereunder in the State of Kansas. (See page 41.)

It is a well known historical fact that the Constitution of Kansas and its legislation has been largely framed upon and copied after the fundamental law and the Statutes of Ohio, and we make this comparison for the purpose of showing the applicability of the reasoning of this court in the Ayres case to the case at bar.

It will be observed by the court that the edition of the general Statutes of Kansas from which the quotations are hereafter made, are not numbered consecutively, but under the new numbering they merely follow section, article and chapter without giving to each section a separate numeral of its own.

It will be found that the section which counsel for the plaintiff in error quotes in his brief on page 25, as Section No. 6847, is in fact Section 7 of Article 1 of Chapter 158, and that Section 6851, quoted by him on the same page of his brief is now known in the Revised Statutes of Kansas of 1897 as Section 16, Article 4, Chapter 158. That section he does not quote in full.

We claim that the latter part of the section defining what debts *cannot be deducted* from credits is almost exactly similar in scope, if not in letter, to the corresponding section, being Section 2730 in the Revised Statutes of Ohio.

The Statutes of Kansas provide, in addition to what is cited in plaintiff's brief, "The person, company or corporation making out the statement of personal property to be given to the assessor claiming deductions herein provided for, shall set forth both the amount and nature of his credits and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company or deferred payment or loan for a policy of life insurance, nor on account of any unpaid subscriptions to any religious, literary, scientific or benevolent institutions or society; provided that in deducting debts from credits no debts shall be deducted where said debt was created by a loan on government bonds or other non-taxable securities."

Taking that portion of that section in connection with the first portion thereof cited as Section 6851 by counsel for plaintiff in error on page 25 of his brief, we find that the Statute of Kansas permitted debts of the classes named "and such as are not owing to any person, company or corporation as depositor in any bank or banking association, or with any person or firm engaged in the business of banking in this place or elsewhere;" that all debts excepting such as have been defined, can be de-

ducted from "the gross amount of the credits belonging to said person, company or corporation." "Credits" as defined by the Kansas act means and includes "every demand for money, labor or other valuable thing, whether due or to become due, but not secured by lien upon real estate." Plainly, the term "credit" in Kansas, from which debts may be deducted, is a more comprehensive term than the term "credits" in Ohio. The only class of credits prohibited from being included in that definition are those "secured by lien on real estate."

It was in the Ayres case that this court said that because the Statutes of Kansas permit some debts to be deducted from some moneyed capital, it did not follow that the moneyed capital in the State of Kansas, from which debts may be deducted as compared with national bank shares, is so large as to amount to an illegal discrimination, and surely if it would not be so large there, under their definition of the term "credits," and debts that may be deducted from "credits," then it is not large enough in Ohio to make an illegal and unjust discrimination against national bank shares.

Counsel for the bank cite the case of Dutton vs. Bank, 53 Kansas, 444, as supporting them in the position they assume. We cannot see how that can help them in the construction they contend for; for, if the court said that all corporate stocks and money secured by judgment or lien on real estate, *and substantially all moneyed capital of every description invested for profit*," shall not be used as a reason for insisting on deduction of debts from national bank shares. So, also, we in Ohio can insist that because *some debts* are deducted from *some credits*, that cannot be used as a reason, by holders of bank shares, to deduct their debts from their bank shares, being moneyed capital.

The court said in the Dutton case (Syllabus 1, "Taxation of National Bank Stock"), "The word 'credit,' as defined in Section 6847 of the General Statutes of 1889, and used in the chapter providing for the assessment and collection of taxes, does not include shares of stock in a national bank, and the owners of such shares have no right to deduct from their assessed value the amount of their debts."

(Syllabus No. 2, "Debts Owing in Good Faith—Deduction—Valid Statute"), "The statute of this State which permits debts owing in good faith by any person, company or corporation to be deducted *from the gross amount of credits belonging to such* person, company or corporation, in listing their property for taxation, when the owners of shares of stock in a national bank are not allowed to deduct their indebtedness from the value of such shares, is not in conflict with Section 5219 of the General Statutes of the United States, does not operate to tax such shares at a greater rate than other moneyed capital in the hands of individual citizens, and is valid. The law providing that all corporate stocks, all moneys secured by judgment or lien on real estate, all moneys on deposit in any bank, subject to withdraw invested for profit, shall be subject to taxation without deduction of indebtedness."

On page 460 of said report the court said:

"The credits referred to in our statute are but one of many kinds of moneyed capital, if indeed they can be regarded as capital at all. It would seem to have been the view of the legislature that only those unsecured credits which were not in general investments for profit, but would in the ordinary course of honest dealing be applied as soon as received, to the extinguishment of mortgage debts and obligations, should be subject to the deduction, and that in fact *such credits* represent no capital whatever where there was a corresponding debt to the payment of which they of right should be devoted."

In Ohio, the term "credits shall be held to mean *the excess* of the sum of all legal claims and demands, etc."

This statutory definition in Ohio of the term "credits" corresponds with the judicial interpretation given by the Supreme Court of Kansas to the term "credits" as defined in their statute above quoted.

The questions involved in the Dutton case are the same questions that came to this court in the case of Bank vs. Ayres, decided at the same term of court by the Supreme Court of Kansas in connection with the Dutton case.

The Ayres case will be found in Volume 53, Kansas Reports, page 463. On page 464 the court say: "The substantial ques-

tions involved in this case are the same as those in Dutton vs. National Bank, Ante., page 440, and the judgment herein is affirmed for the reason stated in the opinion of that case."

We contend that the affirmance of the Ayres case by this court is also an affirmance of the principles enunciated in the Dutton case, and also affirms the construction given by the Supreme Court of Ohio upon the similar question presented in this case; that is, that the word "credit" in Kansas, as in Ohio, does not include shares of stock in a national bank.

In the Dutton case, on page 446, counsel for the plaintiff in error said: "Our constitution was modeled after that of Ohio, and nearly the whole body of our statute laws was borrowed from that State. Where one State adopts the law from another, the judicial construction given to the statute in the State where it originated follows it to the State of its adoption. Citing Bemis vs. Becker, 1 Kansas, 226; Stebbins vs. Guthrie, 4 Kansas, 353." That court seems to have followed this view.

Our position is the same as the position sustained in the Ayres case; and that, the Supreme Court of Kansas has said, involves the same questions as were raised in the Dutton case; hence the Ayres case being sustained by this court, it must follow that the case at bar should also be sustained.

In the case of Hall vs. Board of Commissioners, 22 Kansas, page 37, the Supreme Court of that State held, "that time deposits were credits within the meaning of their statute defining credits."

In Ohio, time deposits are also held to be credits, being a deposit which the person owning * * * is entitled to withdraw, not on demand, as in the case of money, but at the expiration of the time mentioned in the certificate, Section 2730, Revised Statutes of Ohio.

CONSTITUTION OF OHIO.

Section 2, Article 12.

"Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money; but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, *and personal property to an amount* not exceeding in value *two hundred dollars for each* individual, may by general laws, *be exempted from taxation;* but, all such laws shall be subject to alteration or repeal; and the value of all property so exempted, shall from time to time, be ascertained and published as may be directed by law."

Section 3, Article 12.

"*The General Assembly shall provide by law, for taxing notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues, of every description, (without deduction) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals.*"

STATUTES OF OHIO.

Sec. 2730.

"In this title, the terms "real property" and "land" shall be held to mean and include not only land

CONSTITUTION OF KANSAS.

Section 1, Article 11.

"The legislature shall provide for a *uniform* and equal rate of assessment in taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, *personal property to the amount of at* least *Two Hundred Dollars, for each* family, shall *be exempt from taxation.*"

Section 2, Article 11.

"*The legislature shall provide for taxing the notes and bills discounted or purchased, moneys loaned, and other property, effects, or dues of every discription, (without deduction) of all banks now existing or hereafter to be created, and of all bankers; so that all property employed in banking shall always bear a burden of taxation equal to that imposed upon the property of individuals.*"

STATUTES OF KANSAS.

Section 2, Article 1, Chapter 158, Volume 2, of the General Statutes of Kansas Edition of 1897, is as follows:

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itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or in any wise appertaining thereto;

The terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others;

The terms "investments in stocks" shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company or other companies, the capital or stock of which is or may be divided into shares, which are transferrable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others;

The terms "personal property" shall be held to mean and include, first, every tangible thing, being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property, as hereinbefore defined; second, the

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WORDS AND TERMS DEFINED.

Sec. 2. "The terms "real property", "real estate", and "land", when used in this act, except as otherwise specifically provided shall include not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto."

Sec. 3. "The term "personal property" shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds and mortgages, and all evidences of debt secured by lien on real estate; also the capital stock, undivided profits, and all other assets of every company incorporated or unincorporated, and evey share or interest in such stock, profits or assets, by whatever name the same may be designated, provided the same is not included in other personal property subject to taxation or listed as the property of individuals; and also every share or interest in any vessel or boat used in navigating any of the waters within or bordering on this state, whether such vessel or boat shall be within the jurisdiction of the state or elsewhere; and also all "property" owned, leased, used, occupied or employed by any railway or telegraph company or corporation within this state, situate on the right of way of any railway. The words "per-

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capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits or means, by whatsoever name the same may be designated, inclusive of every share, portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat of whatsoever name or description, used, or designed to be used, either exclusively or partially, in navigating any of the waters within or bordering on this state whether such ship, vessel or boat shall be within the jurisdiction of this state, or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely;

The term "money" or "moneys", shall be held to mean and include any surplus or undivided profit held by societies for savings, or banks having no capital stock, gold or silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand;

The term "credits" shall be held to mean the excess of the sum of all legal claims and demands

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sonal property", when used in this act in their general sense, shall include all taxable property other than real property."

Sec. 4. The term "property", when used alone in this act, shall mean and include every kind of property subject to ownership.

Sec. 5. The term "money" or "moneys" shall mean and include gold and silver coin, United States Treasury notes and bank notes, whether in possession or on deposit, subject to be withdrawn in money on demand; and the said term "money" shall also mean and include all "time deposits" made for less period than one year by any bank, person, company or corporation with any bank, person, company or corporation.

Sec. 6. "The term 'time deposits' when used in this act, shall

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whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any

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mean and include the specific time for which the deposit was made."

Sec. 7. "The term 'credit' when used in this act shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate."

Article 2 — Property Exempt From Taxation.

10. "The property described in this section, to the extent herein limited, shall be exempt from taxation:

First. All buildings used exclusively as places of public worship, as public schoolhouses or

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greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid.

* * *

Section 2731 Revised Statutes of Ohio.

"All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title: all tracts of land, set apart for school or ministerial purposes and sold by and under authority of law, and all lands which shall be hereafter sold by the United States, shall be subject to taxation as other lands in this state immediately after such sale: but school or ministerial lands shall not be sold for taxes until the purchase money therefor shall be fully paid but shall be returned as delinquent and continue on the duplicate, with the taxes of each year charged thereon and added to the tax and penalty due when the same became delinquent, until payment be made by the purchaser or his assigns, of such purchase money with the tax and penalty or the lands resold by the county Auditor, pursuant to the laws now or hereafter in force for the sale of such lands."

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both, with the furniture and books therein contained, and used exclusively for the accomodation of schools and religious meetings, together with the grounds owned thereby, not exceeding in any one case ten acres, if not leased or otherwise used with a view to profit; and also any parsonage or dwelling owned by any church society and occupied by its pastor as a residence, together with the ground on which it is situated, not exceeding in any case one-half of an acre.

Second. All lands used exclusively as graveyards.

Third. All buildings and parts of buildings belonging to scientific, literary and benevolent associations, used exclusively for scientific, literary or benevolent purposes, together with the lands not exceeding five acres occupied by such institutions, and attached thereto, if not leased or otherwise used with a view to profit; and all books, papers, furniture, apparatus and instruments belonging to such associations, and used exclusively for scientific, literary and benevolent purposes.

Fourth. All moneys and credits belonging exclusively to universities, colleges, academies or public schools of any kind, or to religious, literary, scientific or benevolent and charitable institutions or associations appropriated solely to sustain such institutions or associations, not exceeding in amount or in income arising therefrom the limit prescribed by the charter of such institution or association.

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Section 2739.

"In listing personal property it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the persons whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money, whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or service of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Section 2758. Unincorporated Banks and Bankers.

"Every company, association, or person, not incorporated under any law of this state, or of the United States for banking purposes, who

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Fifth. All property belonging exclusively to this state or to the United States.

Sixth. All property belonging exclusively to any county, city, town or school district, except lands bid off for counties or cities at tax sales.

Seventh. All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village.

Eighth. All fire engines or other implements used for the extinguishment of fire, with the buildings used exclusively for the safekeeping thereof and for the meeting of fire companies, whether belonging to any town, city or village, or to any fire company organized therein.

Ninth. Personal property to the amout of Two Hundred Dollars for each family."

Tenth. The wearing apparel of every person.

Eleventh. All public libraries.

Twelfth. Family libraries and school books of every person and family, not exceeding in value in any one case Fifty Dollars."

Section 15, Article 4, Chapter 158.

"Merchants and manufacturers stocks and moneys and credits shall be listed under two separate heads — merchants and manufacturers stock forming one item, and moneys and credits forming an-

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shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit shall be deemed a bank, banker, or bankers within the meaning of this chapter."

Section 2759.

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the Auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First — The average amount of notes and bills receivable discounted or purchased in the course of business by such unincorporated banks, banker or bankers, and considered good and collectable.

Second — The average amount of accounts receivable.

Third — The average amount of cash and cash items in possession or in transit.

Fourth — The average amount of all kinds of stocks, bonds, including the United States government bonds, or evidences of indebtedness held as an investment, or in any way representing assets.

Fifth — The amount of real estate at its assessed value.

Sixth — The average amount of all deposits.

Seventh — The average amount of accounts payable, exclusive of current deposit accounts.

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other item, in the statement required to be delivered to the assessor."

Section 16, Article 4, Chapter 158.

"Debts owing in good faith by any person, company or corporation may be deducted *from the gross amount of credits* belonging to such person, company or corporation; provided, *such debts are not owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this place or elsewhere;* and the person, company or corporation making out the statement of personal property to be given to the assessor claiming deductions herein provided for shall set forth both the amount and nature of his credits and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment or loan for a policy of life insurance, nor on account of any unpaid subscriptions to any religious, literary, scientific or benevolent institutions or society; provided, that in deducting debts from credits no debt shall be deducted where said debt was created by a loan on government bonds or other *taxable* (nontaxable) securities."

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Eighth — The average amount of United States government and other securities that are exempt from taxation.

Ninth—The true value in money of all furniture and other property not otherwise herein enumerated.

From the aggregate sum in the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, *and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.*

Section 2759a.

"The said bank, banker or bankers shall, at the same time, make statement under oath, of the amount and capital paid in or employed in such bankers business, together with the number of shares or proportional interest each share holder or partner has in such association or partnership."

Section 2759b.

"That the provisions of Section 2759 shall apply to and govern savings banks incorporated under the act of April 16th, 1867."

Section 2760.

"The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such

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Section 60, Article 5, Chapter 158.

"Stockholders in banks and banking associations and loan and investment companies organized under the laws of this state or of the United States shall be assessed and taxed on the true value of their shares of stock in the city or township where such bank, banking association, loan or investment companies are located; and the president, cashier or other managing officer thereof shall under oath return to the assessor on demand a list of the names of the stockholders and amount and value of stock held by each, together with the value of any undivided profit or surplus; and said bank, banking associations, loan or investment companies shall pay the tax *assessed upon said stock and undivided profits or surplus, and shall* have a lien thereon until the same is satisfied."

Section 61, Article 5, Chapter 158.

"If from any causes the taxes levied upon the stock of any banking association, loan or investment companies shall not be paid by said corporation the property of the individual stockholders shall be held liable therefor; provided further, that if any portion of the capital stock of any bank or banking association or loan or investment companies shall be invested in real estate and said corporation shall

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bank, banker or bankers, on the first Monday of each month of the year preceding the Monday of May in which the return is made, and dividing the same by the number of months in the year; provided, that in case where such bank, banker or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business."

INCORPORATED BANKS.

Section 2762.

"All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located and not otherwise."

Section 2763.

"Real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as real estate of individuals."

Section 2764.

"There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all

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hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots; and provided further, that banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property; and provided further, that the provisions of this act shall apply to all mutual fire and life insurance companies or associations having assets, accumulations, money or credits, and doing business under the laws of this state; and provided further, that such assets, moneys and credits held and under the control of such mutual fire and life insurance company or association shall be subject to assessment and taxation."

Section 62, Article 5, Chapter 158.

"Every private bank, banker, broker, building and loan and trust association shall list and return the average amount of capital invested in such business during the year ending on the first day of March next preceding the time required for listing personal property. The average amount of capital so required to be listed shall be determined by the average amount of

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officers who are or may be authorized to list or assess the value of such shares for taxation."

Section 2765.

"The cashier of each incorporated bank shall make out and return to the Auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share."

Section 2766.

"Upon receiving such report the county Auditor shall fix the total value of the shares of such banks according to their true value in money and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the Auditor."

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private capital or individual funds of such bank, banker, broker, building or loan association invested, used or subject to use in such business, to which shall be added the average amount of net profits remaining undivided at the end of each month during the year."

Section 63, Article 5, Chapter 158.

"The tax assessed against all incorporated and private banks, bankers, brokers, building, loan and trust associations shall be collected in the manner provided for the collection of other personal property tax."

VII. POINTS IN THE BRIEF OF PLAINTIFF IN ERROR CHALLENGED.

1.

Under this head we call the attention of the court to the question raised by the plaintiff in error in his brief, being in that portion thereof inserted between pages 16 and 17 as to unincorporated banks and bankers being authorized by Section 2759 of the Revised Statutes of Ohio to deduct their debts from all legal claims and demands of every kind, and using this in favor of his contention, that there "is a discrimination in favor of private banks, in direct violation of the principle of uniformity and equality of taxation prescribed by the Constitution of Ohio, and in further violation of Section 5219 of the Revised Statutes of the United States."

We cannot concede that the reasoning of learned counsel is correct, nor that the conclusion which he has arrived at is borne out, either as a proposition of law or as warranted from the finding of fact set forth in the record.

On pages 15 and 16 of his brief he refers to Section 2759 of the Revised Statutes of Ohio, and the same is quoted at length in his brief. We do not consider it to be necessary here to again quote it but refer the court to that portion of our brief wherein we cite and quote the same section.

The Supreme Court of Ohio did not say in this case, that incorporated banks, both state and national, and unincorporated banks, both proceed in the same way, and pursuant to the same section, to make their returns for taxation to the taxing officers of the State. Under Sections 2762 to 2767 inclusive, a method is pointed out, by which stockholders in "incorporated banks or banking associations" shall have *their shares taxed*. Under Section 2759 of the Revised Statutes of Ohio a method is pointed out by which "unincorporated banks" shall have their property taxed. Such banks do not have *shares* in the sense as used in Sections 2762 to 2767 inclusive, and persons engaging in the banking business under Section 2759 of the Revised Statutes of

Ohio are partners. Their interest in such business are not denominated shares, and are not capable of being listed under the sections of the statutes governing incorporated banks and banking associations. To meet the case of unincorporated banks some other method had to be devised by the legislature for the purpose of getting at the true taxable valuation, which is the true value in money, of the property engaged in such business. The legislature for that purpose enacted Section 2759, and it does not follow, as we have hereinbefore mentioned, that because methods or systems of taxation may differ, that the ultimate result—equality of taxation—cannot be attained. This is another instance of where classification of various kinds is permitted to be made in order to attain that object, and that each class of property may bear its proportionate amount of taxation.

The question then is, does Section 2759 provide substantially with regard to unincorporated banks what Sections 2762 to 2766 inclusive provides for incorporated banks and banking associations?

In examining this question we first refer to the criticism made by the counsel for the plaintiff in error, at the bottom of page 15 of his brief. Speaking of the Supreme Court of Ohio, he says: "It also fell into a like error in supposing that Section 2759 has any reference whatever to incorporated banks; it related wholly as its terms show to unincorporated banks and bankers."

In the body of its decision on page 328 of Volume 56, Ohio State Reports, the Supreme Court say:

"But in this State both national and state banks are taxed under the same section, being Section 2762, Revised Statutes, and in fixing the value of the shares, the bank deducts its debts from its credits, so that it pays taxes only on the net valuation."

This is true in the sense in which the court stated it, and we must read the context in order to determine what banks the court meant, when it so stated. Incorporated state banks and national banks are all listed together under Sections 2762 to 2766 inclusive, of the Revised Statutes of Ohio, and because the Supreme Court said, "both national and state banks are taxed under the same section, being Section 2762," they should not be understood as saying that *all* state banks are taxed under Section 2762, for

in the very next line on the same page cited above (page 328) the court say:

"Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock."

It is therefore made evident that the court had before them both sections referred to, Section 2759 and Section 2762. And when they said "that unincorporated banks are taxed in the same manner," they meant by that, as they have defined their own meaning, "so as to pay only on the net capital stock." And because the court said that unincorporated banks are taxed in the same manner as national banks, and as incorporated state banks, they do not say that they are taxed by the same method, but that the same object is attained.

At the top of page 329 of the report the reporter makes them to say, that Section 2759 refers to the case of incorporated state banks, but it is plainly a miss-print, as it should have been written unincorporated, instead of incorporated, but all that follows after the word "incorporated," is true with regard to unincorporated state banks, that is "the holder of said stock is compelled to pay taxes upon said value, and is not permitted to deduct *his* legal bona fide debts therefrom." The deductions of the *bank's* indebtedness is not denied by Section 2759; and this court will here make the discrimination between the bank as an entity ,and the partners composing it or individuals owning the capital stock therein. *The bank* has full power given it to deduct *its* indebtedness, but the partners or individuals composing the bank have no authority to deduct *their individual* indebtedness from their holdings or interest in the banks organized under Section 2759, Revised Statutes of Ohio.

The fallacy in the position of counsel for plaintiff in error consists in stating, or in leaving the court to infer, that Section 2759 permits the individuals to deduct *their* indebtedness from their holdings in unincorporated banks, while such privilege is not accorded the holders of national bank shares in Ohio. In this regard Section 2759, Revised Statutes of Ohio, treats the owners of its capital stock in the same manner as Sections 2762 to 2766 inclusive.

It will be noticed by the court, that under Section 2759, Revised Statutes of Ohio, as cited on page 16 of plaintiff's brief, the third item of said section being "the average amount of cash and cash items in possession and in transit shall be added together into one amount," in the manner suggested in the ninth item of that section. That is, "from the aggregate sum of the five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth item as are by law exempted from taxation, and the remainder thus obtained added to the amnout of item ninth shall be entered upon the duplicate of the county in the name of such bank, and taxes thereon shall be assessed, etc."

Following the direction of that statute, and adding together the first five items, it would include *item third*, "being the average amount of cash and cash items in possession or in transit"; and to be permitted to deduct the fifth, sixth, seventh and such portions of the eighth item, *from that* item, would permit such unincorporated banks to have their debts deducted from *their cash and cash items.* This would contravene the principles as set forth in Bank vs. Hines, 3 Ohio State, page 1, and the other cases hereinbefore cited; and for some reason, probably best known to counsel for plaintiff in error, he did not say that that portion of Section 2759, that permits debts to be deducted from cash and cash items, was held by the Supreme Court of Ohio to be unconstitutional.

This will be found in the case of Treasurer vs. Bank, 47 Ohio State, 503, decided October 28th, 1890, so that since that time that portion of the section has been inoperative.

That portion of the syllabus referring to this question is as follows:

"That part of Section 2759, of the Revised Statutes, regulating returns for taxation of unincorporated banks and bankers, which provides that from the aggregate sum of the first five items therein enumerated, the county auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth items as are by law exempt from taxation, is not repugnant to either Section 2 or Section 3 of Article 12 of the Con-

stitution, *except to the extent of including the entire third item among those from which the deduction is to be made.*

"A deduction under Section 2759 of the average amount of all deposits and the average amount of accounts payable, exclusive of current deposit accounts, from the average amount of notes and bills receivable, discounted or purchased in the course of business, by such incorporated bank or bankers, and considered good and collectible, would not be in conflict with either of the above named sections of the Constitution; but, the same deduction from the average amount *of cash and cash items* in possession would contravene Section 2 of Article 12 of the Constitution.

"One part of a section of a statute may be void for want of conformity to the Constitution, without affecting the validity of the remainder, unless the objectionable and unobjectionable portions are essentially and inseparably connected in substance, or are so interdependennt that the general assembly would not have enacted the one without the other."

The court on page 522 of said report says:

"The average amount of all deposits, and of accounts payable, returned by the defendant in the sixth and seventh items of its statement should, therefore, be deducted from the average amount of all its notes and bills receivable, discounted or purchased.

"But this deduction should not be made from the average amount *of cash and cash items* in possession. Money or cash, for the most part, is regarded and treated as property in possession, having intrinsic value, and not the mere evidence of claims upon others. As property in hand, of a tangible nature, distinctive in itself, and determinable as to value without the uncertainty of mere choses in action, it cannot be reduced or diminished on the tax duplicate by deducting from it the liabilities of the owner—whether individual or corporation—without an infringement of the constitutional requirement that all property shall be taxed by a uniform rule. And that portion of Section 2759 of the Revised Statutes, which directs the auditor to make the enumerated deductions, so far as it includes in the aggregate from which the deductions are to be made, *the average amount*

of cash and cash items in possession is, in our view, repugnant to the Constitution and void, but is not otherwise objectionable on constitutional grounds."

As proof that the Supreme Court of Ohio considered that, if the third section was eliminated from the statute it would not give unincorporated banks any advantage over other similar organizations or individuals, we quote what the court say on page 524:

"And furthermore the elimination of the right to make deduction from the average amount of cash and cash items in possession, would only leave the bank on a footing of that equality *with individuals contemplated in the Constitution*—clothed with the right of deducting the sum of its legal bona fide debts, from the sum of its legal claims and demands, and of being taxed on the excess *as credits*."

Having eliminated this one point of contention, what is left of the objection made by counsel that Section 2759, Revised Statutes of Ohio, discriminates in favor of unincorporated banks as against national banks' shares in violation of Section 5219, Revised Statutes of the United States?

Counsel for plaintiff in error further say on page 16½ of their brief, in referring to unincorporated banks, as follows: "They are also authorized to deduct their debts from *investments in stocks of all kinds*. The section requires by subdivision 4 the statement of the bank to the auditor to contain the average amount of all kinds of stocks and bonds, and other evidence of indebtedness, held as an investment, as well as to deduct the debts from bills and accounts receivable. By this section the debts of the bank are taken from the *moneyed investments of every kind*, a right withheld from incorporated state banks, as well as from national banks, thereby creating a discrimination in favor of private banks in direct violation of the principle of uniformity and equality of taxation, etc."

This proposition we deny. This is merely a construction given to this statute by counsel to assist him in his contention in the case at bar; but his construction does not agree with the construction given to the same section, in the case above cited, 47 O. S., 521, by the Supreme Court of Ohio.

That court on page 521 speaking of the term "credits" and of the statutory definition thereof, as well as the judicial interpretation that had been given it, closes the subject in these words:

"Acquiescing in the meaning of the term as thus settled by statute, the amount of the credits of the defendant to be placed upon the duplicate for taxation, will be the excess of all its legal claims and demands over and above its bona fide debts; in other words, its credits will be estimated by deducting such debts *from its legal claims and demands*. What were the legal claims and demands of the defendant as set forth in the return made to the county auditor? They are embraced in the first item of the bank's statement, and are denominated the average amount of all notes and bills receivable, discounted or purchased. From this amount is to be deducted the sum of the legal bona fide debts owing by the bank, which as appear in its return, are specified in the sixth and seventh items, and include the average amount of accounts payable, exclusive of current deposits accounts. * * * The average amount of all deposits, and of accounts payable, returned by the defendant in the sixth and seventh items of its statement, should, therefore, be deducted from the average amount of all its notes and bills receivable, discounted or purchased."

So that the construction as given to said section by the Supreme Court of Ohio is not that such banks are authorized to deduct their debts from investments in stocks of all kinds. Nor does it permit the auditor to deduct the debts of the bank from the amount invested in stocks and bonds and other evidences of indebtedness held as an investment; nor are the debts of the bank to be taken from the moneyed investment of every kind; but on the contrary, the average amount of all deposits contained in the sixth item, and the average amount of accounts payable contained in the seventh item, are to be deducted from the average amount of its notes and bills receivable, discounted or purchased contained in the first item, and that construction given to it by the Supreme Court of Ohio does not contravene Section 5219 of the Revised Statutes of the United States and does not discriminate against national bank shares.

"The construction given to a State statute by its court of last resort will be followed by this court."

Having as we think met the objection made by counsel for plaintiff in error to Section 2759, Revised Statutes of Ohio, what becomes of his contention that the rights conferred by that section are withheld from incorporated state banks as well as from national banks?

We have called attention to the fact that *the bank* as *a bank*, is permitted under Section 2759, to deduct *its* debts, being the sixth and seventh items, from *its* credits, being the first item, as contained in said section; and further, that this right cannot be construed *to extend to the individuals composing the partners in such banks*. The deduction contemplated, is that of the *institution* and not of the *individual* engaged in the institution. This is true in the same degree with incorporated banks, though the method suggested by Sections 2762 to 2766 inclusive, Revised Statutes of Ohio, is different than the method employed for taxing unincorporated banks.

The Supreme Court in the case at bar, on page 329 of their decision, say: "In the case of unincorporated banks when the net value of the capital is ascertained, the bank pays the taxes thereon, *and the several owners of the capital are not allowed to deduct any of their debts from their share of such capital.* It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with capital invested in state banks, and this is all that can be reasonably asked for national banks, in the absence of a showing to the effect that moneyed capital invested in state banks is unreasonably discriminated against. That there is no discrimination against capital invested in state banks, is so clear that no argument is required to establish the fact; and that capital invested in national banks is put upon an exact equality with capital invested in state banks, is equally clear from the sections above referred to. It would therefore seem clear that there is no such discrimination against national bank shares as to give just ground for complaint."

This view of our Supreme Court is supported by the finding of facts, and the uniform practice prevalent in the State of Ohio

with regard to listing the shares of incorporated state banks and national banks.

What can be used as a basis for the assumption of counsel for plaintiff in error, that there is a discrimination made by Section 2759, Revised Statutes, against national bank shares? It is not warranted by the finding of fact, because nothing is before this court showing the amount of moneyed capital employed as capital in unincorporated banks. No evidence is before the court to show that there is even one unincorporated bank in the State of Ohio; and nothing before the court that can be employed "as a basis of comparison with national bank shares." So far as conclusions of fact are concerned, there is nothing contained in the finding. As a question of law, the Supreme Court of Ohio has decided from its own knowledge in this case, that there is no such discrimination against national bank shares as to give just ground for complaint. Counsel admits in his brief, that incorporated state banks and national banks are both treated alike by the Statutes of Ohio, and yet wishes you to find that there is a discrimination made in favor of unincorporated banks, when both the law and the facts are against him.

We have now analyzed the various sections of the Ohio Statutes which relate to and govern the taxing of incorporated banks, including state and national incorporated banks, and also the statute relating to the taxing of unincorporated banks. And the question is presented by opposing counsel that there is a discrimination in the taxing methods between national banks and unincorporated banks, because the section of the Ohio laws, 2759, allows unincorporated banks to make certain deductions from certain credits, but not from all credits, and that this same privilege is not extended to national banks.

It will be noted that Section 2759 relates to private persons engaged in banking, and that it was necessary to have a law governing the taxing of individuals engaged in banking business, and as has already been cited under this heading, as a private individual engaged in banking business did not have his capital represented by shares, a different plan had to be pursued in arriving at the taxing value, and such a bank is in fact treated in the

same manner as a national bank, and we must not be confused in making a comparison of a private and unincorporated bank with national bank shares. The only contention of counsel can be that if a deduction is permitted to be made by a private bank, and the same privilege is not accorded to national bank shares, that there is a discrimination with other moneyed capital.

We quote the following language from the brief of Hon. Jacob F. Burkett of counsel for defendant in error in the case of Charles E. Niles, plaintiff in error, vs. Oliver P. Shaw, treasurer, etc., defendant in error, and reported in 50 O. S., 370, being the same gentleman who, as judge of the Supreme Court of Ohio, delivered the opinion in the case at bar:

"When a holder of national bank stock is deprived from deducting therefrom his bona fide debts, he is deprived of no right allowed to other individuals having the same investments, that is 'investments in stocks,' but they all stand upon an equality. If the national bank man has any credits he is allowed like any other individual to deduct therefrom his bona fide debts, and in that respect again there is an exact equality."

The question therefore is probably presented now, whether or not, by reason of the fact that under Section 2759 the owner of moneyed capital invested in private unincorporated banks is allowed to make certain deductions, or *some* deductions from *some* credits, that that amounts to a discrimination as against owners of national bank shares, such as will come within the provision of Section 5219, Revised Statutes of the United States. We would respectfully suggest to the court that counsel on the other side has not made clear in his brief the distinctions that must be observed in arriving at a correct solution of this problem as we have hereinbefore outlined and explained.

We would say upon this proposition, that the same argument which has been made in a former part of this brief, upon the question as to whether or not there is any discrimination under Section 2730 of the Revised Statutes of Ohio, against owners of national bank shares, by reason of that provision allowing certain deductions to be made from some credits, will equally apply to the question now present under Section 2759.

The same principles of law will apply in determining this question, as will apply in determining the other question of discrimination; and the doctrine fully argued at that point, which has been enunciated by this court in the case of the First National Bank vs. Ayres in 160 U. S., 660, will apply and govern this section.

The deductions which the individual owner of moneyed capital is allowed to make under Section 2759 is of no greater amount than the deductions which the individual owner of credits under Section 2730 is allowed to make for his debts, and therefore, merely, because one law allows an owner of moneyed capital to make some deductions from some credits, does not come within Section 5219, Revised Statutes U. S., for this court has held in the Ayres case, Supra, that in order that a State law shall amount to such a discrimination against national bank shares as will be illegal and in violation of the provisions of Section 5219, it must be so large and substantial as to amount to an illegal discrimination. That fact must be found as a fact by the courts below to enable a reviewing court to determine whether or not an individual owner or owners of moneyed capital invested in private banking business is allowed, or does make deductions under Section 2759, to such an extent as amounts in fact to a substantial discrimination.

And the court will look in vain for any such a finding in the record in this case. So that upon the face of the record it will be forced to conclude that until parties present such facts as will show an illegal discrimination under Section 2759, that there is none.

2.

We next challenge the reason as given by counsel for plaintiff in error on page 15 of his brief, assigned by him why congress by the amended act of 1868 struck out of the original section (being the 41st Section of the act of 1864, 13th United States Statutes at large, page 111), the second restriction or limitation that was placed by congress upon the State's right to tax national bank shares. The part so stricken out by the amended act is as follows:

"Second, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by the act should not exceed the rate imposed upon the shares of any of the banks organized under State authority."

What was the motive for congress striking out that limitation and what results followed in the construction of said act, which is now 5219, Revised Statutes of the United States, by such amendment?

Counsel in his brief filed in the court below found on page 5 thereof, contended, "That the language 'other moneyed capital in the hands of individual citizens of the State' did not and does not mean other moneyed capital invested in shares of other banks, is perfectly obvious from the fact that the amended section, as above shown, entirely omitted that element of comparison. It was evidently stricken out to avoid any such limit to the comparison."

In the brief filed by counsel in this court he adheres to the same position by saying on page 15: "By the amended act of 1868, the second of the above restrictions, viz., limiting the rate of that imposed upon banks organized under said authority, was remitted, leaving the statute in the present form, and therefore eliminating from the consideration of the question all comparison with the taxation upon shares of State banks, except as they were to be treated under the first restriction as moneyed capital in the hands of individual citizens of the State. This amendment showed very clearly the intention of congress not to make the valuation of capital in state bank shares the measure of the valuation of the shares of national banks. If it had so intended it would have repealed the first limitation or restriction above recited, and permitted the second to stand."

With this construction we do not agree. The object of congress in striking out that second limitation and the effect it may have had upon the construction of the act, we consider to be an element in this case. The reason for leaving out the restriction above quoted, appears to us to be because that restriction, viz., "that the rate should not exceed that imposed upon the shares of any banks organized under State authority," is embraced within the restriction, "That it shall not be at a greater rate than is as-

sessed upon other moneyed capital in the hands of individual citizens of said State."

That is, the phrase, "moneyed capital in the hands of individual citizens," includes moneys invested in shares of state banks. The latter expression merely shows the character of the investment, while the former is the comprehensive term descriptive of such character of investments, be it in state or national banking associations. Hence, to leave both restrictions standing together in the same act, when one by proper construction would include the other, would be tautological, and for that, as one of the reasons, the less comprehensive restriction was eliminated from the statute.

It was not for the reason as assigned by counsel, that congress desired to eliminate from the consideration of the question all comparison with the taxation upon shares of state banks; for we still contend that since the enactment as above stated, this court has considered investments in state banks as one of the factors of value by which to fix the rate imposed upon the shares of national banks.

Another reason for this elimination from the statute is that found in the opinion of the court in Lionberger vs. Rouse, 9 Wallace, quoting from page 474:

"The national banks were created especially to provide a national currency at a time when the state banks furnished the entire paper circulation of the country. In providing a system by which the states, where national banks were located and did business, could tax their shares, it was important as their notes came in competition *with state bank paper*, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to provide for different circulation, and this consideration induced congress to limit the State power of taxation in two particulars. In declaring that national bank shares should be taxed like other moneyed capital, and that no burden should be imposed on them from which state banks were exempt, all was done that the necessity of the case required. There was nothing to fear from banks of discount and deposit merely, for in no event could they work a displacement of national bank circulation. It seems,

therefore, clear that the proviso to the 41st Section *was meant by congress to apply to banks of issue.* It is proper in this connection to observe, that the changed condition of the banking interests of the country, *has been the occasion of further legislation by congress on this subject, and that now the power of state taxation over the shares of national banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.*"

Or, it might be said, that state banks having ceased to be banks of issue, the limitation was removed. The reason of the rule having ceased, the rule ceased.

On page 476 of the same report this court say:

"Without pursuing the subject further, it is enough to say, in our opinion, congress meant no more by the second limitation in the proviso to the 41st Section of the national bank act, than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

3.

On page 18 of counsel's brief, it is said, "Inasmuch as every man in the State is authorized to enter into this kind of banking and possess himself of this privilege of competition and thereby bring himself into sharp competition with national banks in carrying on his banking business, a marked discrimination against national bank shares results."

The proposition is denied, as heretofore contended, that because an individual in the State of Ohio invests his capital in an unincorporated bank, it does not thereby give him greater rights *as an individual*, to have his debts deducted from his credits, than he possessed prior to entering into such unincorporated bank. For the banker can only deduct the debts of the bank and not the debts of the individuals composing it.

The individual can deduct certain debts from certain credits by virtue of Section 2730 of the Revised Statutes of Ohio, but

he cannot as an individual, obtain any further right or benefit by entering into an unincorporated bank and investing his capital therein, than if remaining out of the same.

4.

On page 22 of the same brief criticism is made by counsel of the case of Niles vs. Shaw, 50 O. S., 370, as being an ill-considered case, and denied its authority as a precedent to control that court or this court in its judgment.

We contend that the case of Niles vs. Shaw, 50 O. S., 370, is the first authoritative expression by the Supreme Court of Ohio of the express question that is raised in this case. In all the other cases that had preceded that one in the State of Ohio, other propositions were linked up with the question of the right to deduct debts from credits; and in considering it, special stress was laid upon the other phases of the question presented, more than upon the question of the deduction of *some debts from some credits*. As in the case of Bank vs. Hines, the right to deduct debts from "*money*" as defined by the Ohio Statute was considered. That same question was again considered in the case of Latimer vs. Morgan, Supra. In the case of Payne vs. Watterson, Supra., the question was presented of the right to deduct debts from "*investments in bonds;*" and in the case of Treasurer vs. Bank, Supra., the question was presented of the right of an unincorporated bank to deduct its debts from "*its cash and cash items.*"

So that we are warranted in our statement that the case of Niles vs. Shaw is the first expression of the Supreme Court of Ohio on the direct question in issue here.

And as the Whitbeck case was decided by this court on April 23d, 1888, the Niles vs. Shaw was not decided until May 9th, 1893, and the case at bar was not decided by the Supreme Court of Ohio until April 27th, 1897, therefore this court did not have before it at the time of the decision of the Whitbeck case an authoritative expression from the Supreme Court of Ohio upon the question at bar, meaning thereby the right to deduct debts from national bank shares as credits.

We claim that this court will follow the construction given the taxing laws of a State by the courts of last resort of that state; and that where this court may have construed a statute of a State, or announced the policy of a State with regard to any particular legislation of the State, before the Supreme Court of that State had construed such act or announced such policy, that if the Supreme Court of the State, after such decision by this court, takes a different view than that taken by this court of matters relating to State legislation, this court will follow the last expression of the Supreme Court of the State upon such subject.

Under Section 4, page 614, Supplement to the Revised Statutes of the United States, Second Edition, 1874 to 1891, it is provided that for the purpose of all actions against national banks, they are to be deemed citizens of the State in which they are located.

"It is the peculiar province of the State courts to construe their own statutes."

See opinion of Judge Grier in Commercial Bank of Cincinnati vs. Buckingham, 5 Howard, 342, 343.
See also, Adams vs. Preston, 22 Howard, 473.
Congdon Mining Co., vs. Goodman, 2 Black, 574.
Smith vs. Adsit, 16 Wall, 185.
Kingler vs. Missouri, 13 Wall, 257.
Murray vs. Gibson, 15 Howard, 421.
Nichols vs. Levy, 5 Wall, 433.

In the foregoing cases the Supreme Court of the United States refused to disturb the decisions of the Supreme Courts of the states in their construction of State laws.

"The decision of the Supreme Court of a State upon a question of local nature involving the internal policy of the State should be generally followed by the federal courts as binding and conclusive, when the question so decided is afterwards raised in the latter courts between the same parties."

Forsythe vs. Hammond, 166 U. S., 506, 520.
See opinion of Justice Brewer, p. 519, and cases cited.

"The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national

courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where no questions of national authority is involve l, and to accept those decisions as correct, and to follow them whenever the same questions arise in the national courts."

Cooley's Const., Lim. 13.

See footnote to the foregoing, citing numerous authorities in support of the text.

"When the construction concerns the construction or effect of any provision of the Constitution of the State, or, of a statute, and it has been authoratively decided by the court of last resort in the State, the federal courts will consider themselves bound to adopt and apply the doctrine so laid down."

Black's Const. Law, 140.
Shelby vs. Guy, 11 Wheat., 361.
Tp. of Elmwood vs. Marey, 92 U. S., 289.
Cornell University vs. Fiske, 136 U. S., 152.
Sedgwick on the Construction of Statutes, 368.

"The construction given to a statute of a State by the highest tribunal of such State, is regarded as a part of the statute, and is as binding as is the text, upon the courts of the United States."

Gilma vs. Sheboygan, 2 Black, 510.
McClung vs. Silliman, 3 Peters, 270.
Green vs. Neal, 6 Peters, 291.
Ross vs. Duvall, 13 Peters, 45.
Massingill vs. Downs, 7 Howard, 767.
Nesmith vs. Sheldon, 7 Howard, 812.
Van Ramsellaer vs. Kearney, 11 Howard, 297.
Webster vs. Cooper, 14 Howard, 504.

23 Am. & Eng. Encyclopædia of Law, under the head of "Stare Decisis," it is stated: "On the question of the construction or interpretation of State statutes or constitutions, the decisions of the court of the State whose constiution or statute is in question are followed by the federal courts."

The text is supported by a great array of authorities, collated in a footnote on pages 38 and 39.

In the case of Gilman vs. Sheyboygan, 2 Black, 510, the Supreme Court of the United States followed the decision of the

Supreme Court of the State, holding a statute requiring a railroad aid tax leviable exclusively on realty to be "in violation of a provision of the State Constitution, declaring that the rule of taxation should be uniform, and that taxes should be levied on such property as the legislature should prescribe."

Justice Swayne says, page 518:

"Acting upon a principle, recognized in its administration from the earliest period of its history, this court decides and considers itself bound in cases like this, to follow the settled adjudication of the highest State court, giving construction to the Constitution and laws of that State."

Citing Leffingwell vs. Warren, Supra.

In the First National Bank of Garnett vs. Ayres, 160 U. S., 660, it is held that:

"By the decision of the Supreme Court of Kansas, Section 6847, of the General Statutes of that State, defining the word "credit", as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. This court is bound by the interpretation given to the Kansas Statute by the Supreme Court of that State. (New York vs. Weaver, 100 U. S., 539, 541.)"

"Legislation providing for the assessment of railroad property by a State board, while all other property in the State is assessed by county officials, is not obnoxious to any provision in the Federal Constitution.

"The decision of the Supreme Court of Indiana in this case that the Constitution of that State authorizes just the method of assessment adopted in this case, is conclusive upon this court.

"The construction placed by the Supreme Court of the State on the Indiana act of March 6th, 1891 that the railroad companies are given the right to be present and to be heard before the State Board of Tax Commissioners, is conclusive upon this court."

P. C. and St. L. R. Co. vs. Becker, 154 U. S., 421-427.

In Christy vs. Pridgeon, 4 Wall, 203, Justice Field, speaking for the court, says:

"The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations so far as it is a rule, for one action, a different law in one State from what it is in the other."

To the same effect is Detroit vs. Osborne, 135 U. S., 492.

In A. and G. R. R. Co. vs. The State of Georgia, 98 U. S., 359, an issue was made concerning the legality of a tax imposed upon a railroad. Judgment was given in favor of the validity of the tax, and affirmed by the Supreme Court of the State. The cause was brought into the Supreme Court of the United States by a writ of error. The court say:

"The judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the State Constitution is conclusive upon this court, and it will not be reviewed."

In Town of Elmwood vs. March, 92 U. S., 289, the court say:

"This court will follow the decisions of the Supreme Court of a State, that certain town bonds were void because the law which authorized their issue was in violation of the law of the State."

"This court has always followed the highest court of the State in the construction of its own constitution and laws."

See Phœnix Fire and Marine Ins. Co. vs. State of Tennessee, 161 U. S., 174.

May vs. Tenney, 148 U. S., 60.

Leeper et. al. vs. State of Texas, 139 U. S., 462.

Tioga R. R. Co. vs. Blossburg & C. R. Co., 20 Wall, 137, 143.

Amy vs. Dubergne, 98 U. S., 470.

Moores vs. Citizens' Nat. Bk., 104 U. S., 629.

Oaks vs. Mase, 165 U. S., 363.

Forsythe vs. Hammond, 166 U. S., 506, 518.

"The meaning of a State statute, declared by the highest court of a State, is conclusive upon this court.

"*As to the proper construction of a state statute, and as to what is to be regarded as among its terms, no Federal question can arise.*"

Morley vs. R. R. Co., 146 U. S., 162.

"*If the highest judicial tribunal of a state adopt new views as to the proper construction of a statute of the state and reverse its former decisions, this court will follow its latest adjudication.*"

Bauserman vs. Blunt, 147 U. S., 647.

See also, Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 68, 88.

Merchants' Bank vs. Pennsylvania, 167 U. S., 416, 462.

Water Power Co. vs. Water Commissioners, 168 U. S., 557, 566.

Dibble vs. Bellingham Land Co., 163 U. S., 142.

McCain vs. City of Des Moines, 84 Feb. Rep., 726.

Leighton vs. Young, 52 Fed. Rep., 439.

Western Union Tel. Co. vs. Poe, 64 Fed. Rep., 9.

Crowther vs. Richly Ins. Co., 85 Fed. Rep., 41.

Hitt vs. Hitt, 85 Fed. Rep., 268.

Hodge vs. Magnes, 85 Fed. Rep., 355.

The case of Chapman vs. The First National Bank, 56 O. S., 310 (the case at bar), is one in which our Supreme Court construes the taxing laws of this State. The bank in its petition set out that certain of its stockholders, naming them, were each indebted and owing to others of legal bona fide debts, a sum in excess of their credits, from which, under the laws of this State, they were entitled to deduct said debts to an amount equal to the value of such shares. In other words, the bank, assuming to act as trustee or guardian for its stockholders, claimed that the shares of stock held by its stockholders constituted a credit from which they were entitled to deduct their indebtedness when listing their property for taxation. The court held that the shares, for the purposes of taxation, are stocks, and not credits.

The issues in the case raise no question upon Section 5219, R. S. U. S.

VIII.

Every presumption is against any exemption from taxation; the claim made in the bill of the plaintiff bank is plainly one claiming certain property to be exempted from taxation. Where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. The existence of the right must be clear. The exemption must be shown to exist without doubt. At the outset every presumption is against it. A well founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be considered.

This is the rule adopted both by the Federal Court and the Supreme Court of the State of Ohio.

See Treas. vs. Sturges, 46 O. S., pages 153 to 178 inclusive.
Railway Co. vs. Supervisors, 93 U. S., 595.
Tucker vs. Fergueson, 27 Wallace, 527.
Delaware Railroad Tax, 18 Wallace, 206.
Kirtland vs. Hitchkins, 42 Conn., 426.
Cincinnati College vs. State, 19 O., 110.
Railroad vs. Dennis, 116 U. S., 665.
Farrington vs. Tenn., 95 U. S., 679.
Railroad vs. Guffey, 120 U. S., 569.
Railroad vs. City of Saco, 60 Maine, 196.
Lima vs. Cemetery Association, 42 O. S., 128.

It cannot be said that the legislature of Ohio, in enacting the laws hereinbefore cited, has done so with any intention of discriminating against national bank shares and in favor of any other moneyed capital. The statute, which is now Section 2730, was passed in 1859, several years before national banks were established, and hence it cannot be claimed that it was passed for the purpose of discriminating against national bank capital. It treats national bank capital exactly as it treats other bank capital, or exactly as it treats any other capital invested in "stocks"; and capital invested in national bank stock is treated exactly as

capital invested in other "stock." We claim that a national bank has no right to complain.

CONCLUSION.

In conclusion we would say, we have not noticed or commented upon the statistics quoted by counsel for plaintiff in error in his brief, and do not wish our silence to be construed as admitting that the statements of fact therein made are truly stated, or that they are properly before the court. On the contrary, we deny the statements, and deny the right of counsel in attempting to add to the findings of fact by such matters as are *aliunde* the record.

Respectfully submitted,

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